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MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

GREGORY A. CHRISTIAN, *et al.*,

Plaintiffs,

v.

BP AMOCO CORPORATION, *et al.*, ATLANTIC RICHFIELD COMPANY, *et al.*,

Defendants.

Cause No. DV-08-173

Hon. Brad Newman

ATLANTIC RICHFIELD COMPANY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES AS BARRED BY CERCLA

COMES NOW Defendant Atlantic Richfield Company ("Atlantic Richfield"), by and through its counsel of record, and hereby submits its brief in support of its motion for summary judgment on Plaintiffs' claim for restoration damages as barred by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

INTRODUCTION

Plaintiffs assert claims based on alleged environmental contamination to properties located within the legally defined boundaries of a federal Superfund site. The cleanup of that

site has been directed by the United States Environmental Protection Agency ("EPA") under its CERCLA authority for nearly thirty years. Although CERCLA does not prohibit all common-law claims for property damages, it does bar claims that challenge EPA's selected remedy for a site or that propose an alternative or additional remedy. Because Plaintiffs' claim for restoration damages attempts to do both of those things, it is barred by CERCLA and therefore must be denied as a matter of law.

CERCLA, also known as the "Superfund" law, was enacted in 1980 to promote the cleanup of contaminated sites around the country. EPA has broad authority under CERCLA to clean up contaminated sites itself or to require liable parties to perform the cleanup under EPA's direction. A core feature of CERCLA is that it prohibits interference with EPA's chosen remedy. CERCLA accomplishes this goal primarily by (1) barring any "challenge" to an ongoing EPA-sanctioned CERCLA cleanup, and (2) requiring that all cleanup activity at an EPA site be approved by EPA.

Plaintiffs' claim for restoration damages violates both of these CERCLA provisions. Their restoration claim is a direct attack on EPA's chosen remedy at an actively regulated Superfund site. Plaintiffs intend to criticize EPA's regulatory process, and then request a finding from this Court that a different remedy should be performed at the site—a remedy that was rejected by EPA. Although styled as a request for monetary damages, Plaintiffs' claim for restoration damages depends upon a judicial finding that they can and will perform their preferred remedy with the money awarded. Indeed, to obtain restoration damages under Montana law, *the jury must find that Plaintiffs actually will perform* their non-EPA-approved cleanup plan. But Plaintiffs cannot and will not perform their alternate remedy as a matter of law because CERCLA prohibits it. There is no genuine issue of material fact that Plaintiffs' claim for restoration damages violates CERCLA. Atlantic Richfield is therefore entitled to summary judgment as a matter of law on that claim.

BACKGROUND

I. The CERCLA Statutory Framework

"As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). CERCLA "[s]ections 104 and 106 provide the framework for federal abatement and enforcement actions that the President, [or] the EPA as his delegated agent ... initiates." *Id.* (citing 42 U.S.C. §§ 9604, 9606). CERCLA empowers EPA to: (1) perform cleanup actions itself; (2) compel responsible parties through an administrative order to perform cleanup actions under EPA's supervision; or (3) enter into agreements with potentially responsible parties ("PRPs") to perform specified cleanup actions. *See* 42 U.S.C. §§ 9604, 9606.

EPA implements CERCLA's requirements through federal regulations known as the National Contingency Plan ("NCP"), 40 C.F.R. Part 300. The NCP establishes the regulatory process EPA follows to compare remedial alternatives and choose a response. "Before selecting a response action ... the NCP requires that the EPA first conduct a remedial investigation and feasibility study ...." *United States v. Asarco Inc.*, 430 F.3d 972, 976 (9th Cir. 2005). During the remedial investigation and feasibility study ("RI/FS"), EPA will "assess site conditions and evaluate alternatives" and then select a remedy that will "eliminate, reduce, or control risks to human health and the environment." 40 C.F.R. § 300.430(a)(1)-(2); *see also Razore v. Tulalip Tribes*, 66 F.3d 236, 238 (9th Cir. 1995) ("The objective of the RI/FS is to make an informed choice among possible cleanup alternatives."). Once EPA selects its preferred remedy, it presents the remedy to the public for review and comment. Following the public comment period, EPA selects a final remedy and memorializes it in a public document called a Record of Decision ("ROD"). 40 C.F.R. § 300.430(f)(3)-(6).

Recognizing that Superfund sites often encompass large areas with many different property owners and other interested community members, "CERCLA also provides for community input throughout the cleanup process." *New Mexico v. Gen. Elec. Co.*, 467 F.3d

1223, 1234 n.19 (10th Cir. 2006). CERCLA's "public participation requirement has two main components." *Carson Harbor Vill. v. Cnty. of L.A.*, 433 F.3d 1260, 1266 (9th Cir. 2006). First, EPA must interview local officials and community residents, prepare a community relations plan to ensure public involvement, and establish a local information repository to make information about the cleanup available to the public. *Id.* Second, after choosing a cleanup plan, EPA must "publish notice of the plan in a local newspaper, provide an opportunity for submission of comments on the proposed plan, provide an opportunity for a public meeting, make a transcript of the meeting available to the public, and prepare a written summary of significant comments and responses to those comments." *Id.*

Although CERCLA provides for significant public participation, once EPA selects a remedy, CERCLA strictly circumscribes the ways in which EPA's chosen remedy may be challenged. "Congress concluded that the need for [EPA] action was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in process." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (citation omitted). "To ensure that the cleanup of contaminated sites will not be slowed or halted by litigation, Congress enacted section 113(h) in its 1986 amendments to CERCLA." *Razore*, 66 F.3d at 239. Section 113(h), discussed more fully below, bans all court challenges to an EPA cleanup that fall outside the narrow exceptions enumerated in the statute.

For similar reasons, Congress amended CERCLA to add section 122(e)(6). Section 122(e)(6), also discussed more fully below, prevents private cleanup work at a site after a remedial investigation and feasibility study has begun, absent EPA's approval to perform that work. The purpose of section 122(e)(6) is to prohibit private cleanup work because it could interfere with EPA's chosen remedy or exacerbate the contamination problem. *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 539 n.28 (3d Cir. 2006), *vacated on other grounds*, 551 U.S. 1129 (2007).

Courts "give deference to the EPA's choice of response action and will not substitute [their] own judgment for that of the EPA." *United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 689 (10th Cir. 1999); *see also United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1246 (9th Cir. 2005) ("We defer to the EPA's reasoned judgment.").

II. The Superfund Site and CERCLA Cleanup at Issue

The Anaconda Smelter Site ("Site") became a federal Superfund Site in 1983. *See* 48 Fed. Reg. 40,658 (Sept. 8, 1983). Plaintiffs' properties are encompassed within the Site. Affidavit of Michael McLeod ("McLeod Aff."), Ex. A, ¶ 8.[1] Pursuant to the CERCLA process described above, Atlantic Richfield has worked cooperatively with EPA—as well as state and local agencies—since the early 1980s to conduct extensive environmental investigations and complete a tremendous amount of cleanup work at the Site, at the cost of many millions of dollars.[2] *See* Affidavit of Richard E. Bartelt ("Bartelt Aff."), Ex. B, ¶ 8.

EPA and Atlantic Richfield entered into an agreement to begin investigating the Site in 1982. *Id.* ¶ 7. EPA issued its first administrative order to Atlantic Richfield in 1984, which required Atlantic Richfield to perform a site-wide RI/FS. *Id.* ¶ 9. Atlantic Richfield completed that RI/FS in 1987. *Id.* EPA divided the Site into five major sections called Operable Units ("OUs") to make the cleanup more manageable. *Id.* ¶ 10. All of these OUs have their own RODs from EPA, describing the remedial work that is required. *Id.*

Two of the Site OUs, Community Soils ("CSOU") and Anaconda Regional Water, Waste, and Soils ("ARWWS OU") relate directly to Plaintiffs' properties. *Id.* ¶ 11. CSOU addresses primarily residential soils throughout the entire Site, including residential yards. *Id.* ¶ 12. ARWWS OU addresses all remaining contamination at the Site not expressly addressed by other OUs, including surface water, groundwater, and non-residential soils. *Id.* ¶ 13.

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[1] *See also* http://www.epa.gov/region8/superfund/mt/anaconda/index.html ("EPA website") (last visited May 14, 2013) (stating that the town of Opportunity is "within the site footprint"). Portions of two Plaintiff properties extend outside the boundary of the Site. Those portions, however, are within the boundaries of another, adjacent Superfund site. McLeod Aff. ¶ 8.

[2] For a more complete overview of the CERCLA cleanup at the Anaconda Smelter Site, see the EPA website, *supra*.

Under an administrative order first issued in 1988, EPA required Atlantic Richfield to conduct separate RI/FSs for both CSOU and ARWWS OU. *Id.* ¶¶ 14-15. Atlantic Richfield completed those RI/FSs in 1996. *Id.* ¶ 15. EPA made its remedy-selection decisions in separate RODs of these OUs—in 1996 for CSOU and in 1998 for ARWWS OU. *Id.* ¶ 16. Atlantic Richfield has performed significant remedial work under the terms of those RODs and the orders EPA issued requiring Atlantic Richfield to implement them.

The CSOU ROD requires testing of residential yards in certain areas of the Site and provides for cleanup of any yards exceeding an EPA-established action level of 250 parts per million ("ppm") arsenic (measured on a yard-weighted average basis). Cleanup for yards exceeding the action level consists of removing the soil in areas exceeding 250 ppm arsenic and replacing it with clean soil and sod. *Id.* ¶ 17. Pursuant to this ROD, Atlantic Richfield has sampled over 1,700 residential yards and cleaned up 350 yards in and around Anaconda. *Id.* ¶ 20. Notably, because EPA determined that contamination in the communities where Plaintiffs live (Opportunity and Crackerville) did not present a risk to human health or the environment sufficient to warrant mandatory testing, the CSOU ROD required testing of soils in these communities only if the homeowner requested it. *Id.* ¶ 18. In response to such requests, including by some Plaintiffs, Atlantic Richfield tested many of the yards in Opportunity and Crackerville. *Id.* ¶ 19. Based on those tests, Atlantic Richfield previously cleaned up two of Plaintiffs' yards, and has outstanding offers to clean up other properties belonging to Plaintiffs based on additional testing performed in connection with this lawsuit. *Id.* ¶ 21. EPA ordered Atlantic Richfield to perform the work specified by the CSOU ROD, and all of the work Atlantic Richfield has performed under the CSOU ROD has been supervised and approved by EPA. *Id.* ¶¶ 16-17, 28.

Under the ARWWS OU ROD, Atlantic Richfield's work has included remediation of vast areas of non-residential soils, former disposal ponds associated with the smelter facility, fluvial tailings, and portions of Warm Springs Creek. *Id.* ¶ 27. Relevant here, the groundwater component of the ARWWS OU ROD requires testing and remediation of

residential wells to ensure a safe drinking water supply to all households. *Id.* ¶ 23. Per the terms of that ROD, Atlantic Richfield has tested the domestic wells of Opportunity and Crackerville residents, including Plaintiffs. *Id.* Ten parts per billion ("ppb") is the federal and state drinking water standard for arsenic. *Id.* ¶ 24. Under the ARWWS OU ROD, if a domestic well tests under 5 ppb arsenic, no further action is taken. *Id.* ¶ 25. If it tests over 5 ppb but under 10 ppb arsenic, the well is monitored annually for three years to make sure it does not exceed 10 ppb. *Id.* If the well tests over 10 ppb arsenic, the well is replaced and bottled water is provided to the homeowner in the interim until replacement is complete and water quality is confirmed. *Id.* Two wells on Plaintiffs' properties tested over 10 ppb in arsenic; Atlantic Richfield replaced both of those wells. *Id.* ¶ 26. EPA ordered Atlantic Richfield to perform the work specified by the ARWWS OU ROD, and all of the work Atlantic Richfield has performed under the ARWWS OU ROD has been supervised and approved by EPA. *Id.* ¶¶ 23, 28.

The cleanup work under both the CSOU ROD and the ARWWS OU ROD is ongoing. *Id.* ¶ 28. In fact, EPA is currently in the process of amending the CSOU ROD to require, among other things, certain testing and cleanup of lead in residential soils, including the properties of Plaintiffs. *Id.* ¶ 22. Once the CSOU ROD amendment is final, EPA will require Atlantic Richfield to perform that additional cleanup work. In accordance with CERCLA, there has been extensive public participation in EPA's cleanup decisions at the Site, including with respect to the CSOU and ARWWS OU remedies that apply to Plaintiffs' properties. *Id.* ¶ 29.

III. Plaintiffs' Claim for Restoration Damages

Plaintiffs are a group of individuals who describe themselves as "own[ing] real property in and around Opportunity, Montana." Third. Am. Compl. ¶ 1. Plaintiffs allege that Atlantic Richfield and its predecessors damaged their property while conducting "a milling and smelting operation located near the towns of Anaconda and Opportunity ... from 1884 to 1980." *Id.* ¶ 11. As a result of "Defendants' wrongful and unlawful acts and omissions,"

Plaintiffs claim the following damages: (a) "[i]njury to and loss of use and enjoyment of real and personal property;" (b) "[l]oss of the value of real property;" (c) "[i]ncidental and consequential damages, including relocation expenses and loss of rental income and/or value;" (d) "[a]nnoyance, inconvenience and discomfort over the loss and prospective loss of property value;" and (e) "[e]xpenses for and cost of investigation and restoration of real property." *Id.* ¶ 43(A)-(E). This Motion is directed only to this last category of "restoration" damages.

Under Montana law, a plaintiff may elect to recover restoration costs, rather than diminution in value, as the measure of property damage in appropriate circumstances. *Sunburst Sch. Dist. No. 2. v. Texaco*, 2007 MT 183, ¶ 38, 338 Mont. 259, 165 P.3d 1079; *see also Lampi v. Speed*, 2011 MT 231, ¶¶ 22-23, 362 Mont. 122, 261 P.3d 1000; *McEwen v. MCR, LLC*, 2012 MT 319, ¶ 29, 368 Mont. 38, 291 P.3d 1253 (both applying *Sunburst*). In order to recover restoration damages, the plaintiff must prove that (1) the injury to his property is temporary, i.e., reasonably abatable or capable of being restored without unreasonable hardship or expense, and (2) that he has "reasons personal" for requesting such damages. *Lampi*, ¶ 29.

"The personal reasons analysis includes a determination of whether the plaintiff genuinely intends to restore the property." *McEwen*, ¶ 31. In other words, to recover restoration damages under Montana law, the plaintiff must present evidence and convince the fact-finder that he actually will conduct the property restoration upon which his claim of damages is based. *Lampi*, ¶ 31 ("The reasons personal rule requires plaintiff to establish that the award actually will be used for restoration ...."); *Sunburst*, ¶ 43 (affirming award of restoration damages where "the record in this case indicates that Sunburst actually will use the award of restoration damages to remediate the groundwater contamination"). This requirement "ensure[s] that an injured property owner does not profit from restoration damages," thereby receiving a "windfall." *McEwen*, ¶ 50 (citing *Sunburst*, ¶ 40).

Plaintiffs recently disclosed their experts in this case, revealing for the first time their restoration plan and the basis of their claim for restoration damages. [3] One of Plaintiffs' experts, Richard Pleus, entitled his report "Critique of the Final Baseline Human Health Risk Assessment for the Anaconda Smelter NPL Site, Anaconda, Montana (CDM 1996) and Reassessment of Soil Screening Levels for the Opportunity Community" ("Pleus Rep."). As the title indicates, Dr. Pleus criticizes EPA's risk assessment and chosen action level for soils cleanup at the Site. Dr. Pleus opines that "[m]y review of the U.S. EPA Superfund ROD for the Anaconda Company Smelter in Anaconda, MT ... [and risk assessment] has found that [EPA's] arsenic risk estimate and residential action level of 250 ppm is not appropriate." Pleus Rep. at v. Dr. Pleus then conducts his own risk assessment and concludes that the soils action level should be 8 ppm. *Id.* at v; 42-43; 56-57. Dr. Pleus thus substitutes his own judgment for EPA's, even though that judgment is reserved to the agency. *See* 40 C.F.R. § 300.430(d)(4) ("[T]he lead agency shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment ....").

Another of Plaintiffs' experts, John Kane, opines (1) that restoration of Plaintiffs' property is necessary, (2) how he believes such a restoration should be conducted, and (3) what the restoration will cost. Expert Report of John R. Kane ("Kane Rep."). Mr. Kane proposes both a soils remedy and a groundwater remedy for Plaintiffs' properties. *Id.* at 10-11. His soils remedy consists of the removal of the top two feet of soil from Plaintiffs' properties (650,000 tons in total), with transportation and disposal at a landfill in Spokane, Washington, and replacement with new soil. *See id.* His groundwater remedy includes the construction of "underground Passive Reactive Barrier (PRB) wall[s]," one that he estimates will be "8,000-foot long, 15-foot deep and 3-foot wide" in some unspecified location "up-gradient of Opportunity" as well as other, "shorter PRB walls ... upgradient of individual Crackerville properties." *Id.* at 11. Mr. Kane estimates the total cost of his proposed remedy—Plaintiffs' claimed restoration damages—to be $101 million. *Id.*, Table 1.

[3] Plaintiffs filed their expert reports with the Court on April 15.

The opinions of Dr. Pleus and Mr. Kane directly contradict the remedies EPA selected for the Site. Significantly, EPA considered and rejected soils and groundwater remedies similar to those proposed by Mr. Kane in the course of its regulatory deliberations at the Site. Bartelt Aff. ¶ 31. In determining the action level of 250 ppm for arsenic, EPA considered lower action levels—which would have required more extensive soil removal and yard replacements—but rejected them as unnecessary to protect human health and the environment. *Id.* ¶ 32. Likewise, in the course of determining what remedy was required for surface and groundwater in the Opportunity and Crackerville areas, EPA considered a PRB wall up-gradient of Opportunity, but concluded it was impracticable and unnecessary. *Id.* ¶ 33. Plaintiffs are poised to attack these regulatory conclusions at trial with testimony from Dr. Pleus and Mr. Kane that EPA's findings are incorrect and EPA's selected remedies are inadequate.[4]

LEGAL STANDARD

Summary judgment should be granted "'if the pleadings, depositions, answers to interrogatories, and admissions on file,' together with any affidavits demonstrate that no genuine issue exists as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law." *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 10, 344 Mont. 435, 188 P.3d 1063, (quoting Mont. R. Civ. P. 56(c)). Under Rule 56(b), Mont. R. Civ. P., a party may move "for summary judgment on all or part of the claim." A defending party may therefore be entitled to summary judgment on a certain type or category of damages. *See, e.g., Corporate Air v. Edwards Jet Ctr.*, 2008 MT 283, ¶ 54, 345 Mont. 336, 190 P.3d 1111. In all cases, "[d]amages must be proven by substantial evidence which is not the product of mere guess or speculation." *Sebena v. Am. Auto. Ass'n* (1996), 280 Mont. 305, 309, 930 P.2d 51, 53. "[W]here no costs have been incurred, and no costs are reasonably certain to be incurred in the future, the plaintiff has not stated a claim for

[4] *See* Pleus Rep. at v (criticism of EPA's findings related to soil); Kane Rep. at 6 (criticism of EPA's findings related to groundwater).

damages," and summary judgment should be granted. *Town of Superior v. Asarco, Inc.*, 874 F. Supp. 2d 937, 949 (D. Mont. 2004); *see also B.M. by Berger v. State* (1985), 215 Mont. 175, 179, 698 P.2d 399, 401 ("Where plaintiff presents evidence of damages which are purely speculative, summary judgment is appropriate.").

ARGUMENT

CERCLA bars Plaintiffs' claim for restoration damages in two separate ways. First, CERCLA section 113(h) precludes Plaintiffs' restoration remedy because it impermissibly "challenges" the EPA-selected remedy. Second, CERCLA section 122(e)(6) precludes Plaintiffs' restoration remedy because it prohibits Plaintiffs from performing non-approved cleanup work at the Site. Because CERCLA prohibits Plaintiffs from performing their restoration remedy, it renders them unable to establish a prerequisite to an award of restoration damages as a matter of law. Thus, their claimed restoration damages *certainly will not be incurred in the future*, and allowing restoration damages in this case would result in exactly the sort of "windfall" the Montana Supreme Court cautioned against. The Court should therefore grant summary judgment on Plaintiffs' claim for restoration damages.

I. CERCLA Section 113 Bars Plaintiffs' Claim for Restoration Damages.

"Section 113(h) of [CERCLA] bans all challenges to ongoing remedial or removal actions." *Razore*, 66 F.3d at 238. The statute provides in part:

> No Federal court shall have jurisdiction under Federal law ... or under State law ... to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title ....

42 U.S.C. § 9613(h).[5] This section "is clear and unequivocal," and "amounts to a blunt withdrawal of federal jurisdiction" for "any challenges" to a CERCLA cleanup. *McClellan*, 47 F.3d at 328. This section applies equally to actions brought in state courts because "Congress did not intend to preclude dilatory litigation in federal courts but allow such

[5] The statute contains five exceptions, but none apply here. Three of the five exceptions apply only to EPA. 42 U.S.C. § 9613(h)(2), (3), (5). The other two exceptions are a CERCLA cost recovery or contribution action under section 9607, *id.*(1), and a CERCLA citizen suit under section 9659 that can only be initiated after the cleanup is complete, *id.*(4).

litigation in state courts." *Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999) ("We believe Congress only removed *federal* court jurisdiction from 'challenges' to CERCLA cleanups because only federal courts shall have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place."). And this section applies to causes of action brought under state law. *Id.* (Section 113 "cover[s] any 'challenge' to a CERCLA cleanup" even if brought under state law.); *see also ARCO Envtl. Remediation, LLC v. Dep't Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000) (same).[6]

Thus, Plaintiffs' claim for restoration damages may proceed under section 113(h) only if "(1) the EPA has not initiated a removal or remedial action under section 9604, or (2) the plaintiffs are not 'challenging' such action." *Razore*, 66 F.3d at 239. Plaintiffs' restoration claim fails both parts of this test.

A. EPA Has Initiated Removal and Remedial Actions at the Site.

Here, EPA long ago initiated removal and remediation actions at the Site under section 9604, including with respect to Plaintiffs' properties. CERCLA defines a removal action as "the cleanup or removal of released hazardous substances from the environment," including "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23). Remedial actions include "those actions consistent with permanent remedy taken instead of or in addition to removal action in the event of a release or threatened release of a hazardous substance." *Id.* § 9601(24). Although EPA had earlier initiated multiple removal and remedial actions at the Site, it issued its first order directly related to Plaintiffs' properties in 1988, and did so expressly under CERCLA section 9604. Bartelt Aff. ¶ 14. That order required Atlantic Richfield, among other things, to perform an RI/FS for both CSOU and ARWWS OU. Atlantic Richfield has completed those RI/FSs, and EPA has issued RODs for both CSOU and

[6] For examples of state courts dismissing state law claims under CERCLA section 113, see *Willis v. City of Rialto*, No. E051792, 2012 WL 3871997, at * 7-9 (Cal. Ct. App. Sept. 7, 2012), *O'Neal v. Department of the Army*, 742 A.2d 1095, 1100 (Penn. Sup. Ct. 1999), and *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032-33 (Colo. App. 1997), attached as Exhibit C.

ARWWS OU. The RODs, together with certain administrative orders EPA subsequently issued, required Atlantic Richfield to begin specific remedial actions, including the remedial actions applicable to Plaintiffs' properties. Those remedial actions are ongoing today.

The Ninth Circuit has held that, when EPA begins an RI/FS, it has initiated a removal action within the meaning of section 113(h). *Razore*, 66 F.3d at 239 ("A RI/FS satisfies this definition."). Here, at a mature site under EPA regulation for nearly 30 years, where multiple RI/FSs have been completed and remedial work has begun, there can be no question that the first requirement in section 113(h) is met.

B. Plaintiffs' Claim for Restoration Damages "Challenges" EPA's Remedy for Their Properties.

The question, then, turns on whether Plaintiffs' claim for restoration damages "challenges" the CERCLA cleanup. If so, their claim must be dismissed.

"An action constitutes a challenge if it is related to the goals of the cleanup." *Razore*, 66 F.3d at 239. Likewise, a claim challenges a CERCLA cleanup if it "interfere[s] with the remedial actions selected under CERCLA Section 104," or "seeks to improve on the CERCLA cleanup." *McClellan*, 47 F.3d at 330. The Ninth Circuit also has barred lawsuits under section 113(h) "where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to terminate the RI/FS and alter the method and order of cleanup." *ARCO Envtl.*, 213 F.3d at 1115 (internal citations omitted).

Plaintiffs' claim for restoration damages easily satisfies these criteria for a "challenge" to an ongoing CERCLA cleanup. Plaintiffs intend to convince the jury that: (1) EPA's assessment of the risk to human health and the environment was incorrect; (2) EPA's chosen soils and groundwater remedies are insufficient; (3) soils and groundwater remedies different from the ones EPA selected are necessary to clean up Plaintiffs' properties; and (4) they actually will use any money awarded to perform their alternative remedies. It is difficult to imagine a case that more clearly "challenges" a CERCLA remedy. Accordingly, Plaintiffs' claim for restoration damages is barred by section 113(h).

Plaintiffs may argue that their restoration claim is merely a request for money damages from Atlantic Richfield, and that the mere act of Atlantic Richfield paying money to Plaintiffs does not challenge or interfere with the CERCLA remedy. CERCLA does allow damage claims so long as they do not challenge or interfere with EPA's remedy—which is why Plaintiffs' claims for damages based on diminution in property value and loss of use are not barred and not the subject of this Motion. *See Fort Ord*, 189 F.3d at 831 ("Congress did not want § 113(h) to serve as a shield against litigation that is unrelated to disputes over environmental standards."); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995) (damages claim for diversion of water rights not a "challenge" because it would not interfere with the "implementation of the cleanup"). But Plaintiffs' claim for restoration damages is different. Those damages depend upon the jury finding that Plaintiffs actually will perform their restoration remedy. And it is the actual performance of Plaintiffs' restoration remedy—a prerequisite to their damage award—that impermissibly challenges EPA's remedy. Under section 113(h), a plaintiff cannot "achieve indirectly through the threat of monetary damages ... what it cannot obtain directly through mandatory injunctive relief [to perform a remedy] incompatible with the ongoing CERCLA-mandated remediation." *Gen. Elec.*, 467 F.3d at 1249-50 (finding state's claim for restoration damages barred by section 113(h), rejecting argument that state was "not seeking to alter or expand the EPA's response plan but rather only to acquire money damages"). Indeed, Plaintiffs' remedy more than challenges EPA's remedy; it outright conflicts with it. Plaintiffs cannot seriously contend that performing their own area-wide cleanup at a Superfund Site—including digging an 8,000 foot trench for a groundwater wall and removing 650,000 tons of soil over a period of years—would not conflict with the ongoing EPA investigation and cleanup at the Site.

CERCLA allows for public input and participation in EPA's remedial decisions. But once EPA makes those decisions, CERCLA prohibits challenges like the one Plaintiffs make in this case. The Court should therefore grant summary judgment to Atlantic Richfield dismissing the restoration damages claim.

II. CERCLA Section 122 Bars Plaintiffs' Claim for Restoration Damages.

Even if Plaintiffs' claim for restoration damages did not "challenge" EPA's remedy, it is equally barred by CERCLA section 122(e)(6). That section provides:

> **(6) Inconsistent response action**
> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. § 9622(e)(6). Congress enacted this section to "avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. S14895-02, 1986 WL 788210 (daily ed., Oct. 3, 1986). By its plain terms, section 122(e)(6) prohibits Plaintiffs' claim for restoration damages.

First, there is no genuine dispute that EPA has initiated an RI/FS at the Site pursuant to an administrative order. As discussed above, multiple RI/FSs have been completed at the Site pursuant to administrative orders, including the RI/FSs for CSOU (soils) and ARWWS OU (groundwater) that encompass Plaintiffs' properties and that are challenged by their experts.

Second, Plaintiffs are potentially responsible parties or "PRPs" under CERCLA. "CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009). One of these classes of PRPs is current owners of property at a CERCLA facility. 42 U.S.C. § 9607(a)(1); *see also Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 912-13 (9th Cir. 2010) (This section "refer[s] to 'current' owners."). Current property owners are PRPs regardless of fault. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) ("[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility ... without regard to causation."). And current property owners are PRPs regardless of how small a percentage of the facility they own. *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-80 (3d Cir. 1993) (owner of less than 10% of a facility still an

"owner" under CERCLA), *overruled on other grounds by United States v. E.I. DuPont de Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005). By their own allegations, Plaintiffs are current property owners, Third Am. Compl. ¶ 1, and their properties are within the Site.[7]

Third, the Anaconda Smelter Superfund Site is a "facility," within the meaning of CERCLA. A facility is defined as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B). "[T]he term 'facility' has been broadly construed by the courts, such that in order to show that an area is a 'facility,' the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1360 n.10 (9th Cir. 1990) (internal quotation marks omitted). Plaintiffs' own allegations confirm that the Site—and their properties specifically—fit the CERCLA definition of a facility. *See* Third Am. Compl ¶ 12 ("Defendants ... caused toxic and hazardous smelter and ore processing wastes ... to enter the air, soil, surface waters, and groundwater in and around said facilities.").[8]

Fourth, Plaintiffs' proposed remedial action has not been authorized by EPA. Indeed, Plaintiffs' whole claim for restoration damages is premised on the opposite of EPA approval: *they want to convince the jury that the EPA-approved remedy is inadequate and that their private remedy is required.* This is a dispositive failure of proof by Plaintiffs—by itself sufficient for summary judgment. *See Stipe*, ¶ 14 ("[A] claim fails as a matter of law if the plaintiff fails to establish the material elements of the claim, including damages."); *Sebena*, 280 Mont. at 309, 930 P.2d at 53 (A plaintiff must prove damages "by substantial evidence."). Moreover, the undisputed evidence shows that the remedies Plaintiffs propose—far more

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[7] As noted, two Plaintiff properties extend into a neighboring Superfund site. That is immaterial to this analysis, as the neighboring site also qualifies as a CERCLA "facility." *See infra.*

[8] It does not matter whether the Court considers the relevant "facility" to be the entire Anaconda Smelter Site, some subdivision of it like CSOU, or each of Plaintiffs' individual properties. All qualify as a "facility" under CERCLA. *See generally Sierra Club v. Seaboard Farms Inc.*, 387 F.3d 1167, 1170-72 (10th Cir. 2004) (discussing breadth of "facility" definition and its applicability to a site as a whole or certain portions of it).

extensive soil removal and PRB groundwater walls—not only were not approved by EPA, they were affirmatively *rejected* by EPA. Bartelt Aff. ¶¶ 31-33. There is no genuine dispute of fact on this point.

For all of these reasons, section 122(e)(6) applies to this case and prohibits Plaintiffs from performing their proposed restoration plan. Requiring proof that property owners actually will perform their restoration "ensures that a property owner who recovers an award of restoration damages does not pocket the money instead of using the money to restore the damaged property." *McEwen*, ¶ 50. With actual performance of their restoration plan barred by CERCLA, any recovery of restoration damages in this case could only be "pocket[ed]" by Plaintiffs, rather than used to restore their property—the very "windfall" the Montana Supreme Court has forbidden. Accordingly, restoration damages may not be recovered in this case as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Atlantic Richfield and dismiss Plaintiffs' claim for restoration damages with prejudice.

Dated this 17th day of May, 2013.

Respectfully submitted,

John P. Davis
Patrick M. Sullivan
POORE, ROTH & ROBINSON, P.C.

Jonathan W. Rauchway
Shannon Wells Stevenson
Mark E. Champoux
DAVIS GRAHAM & STUBBS LLP

Attorneys for Defendant
Atlantic Richfield Company

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2013, a true and correct copy of the foregoing **ATLANTIC RICHFIELD COMPANY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES AS BARRED BY CERCLA** was sent by U.S. mail, first class postage prepaid and addressed to:

Tom L. Lewis, Esq.
J. David Slovak, Esq.
Mark M. Kovacich, Esq.
Lewis, Slovak & Kovacich, P.C.
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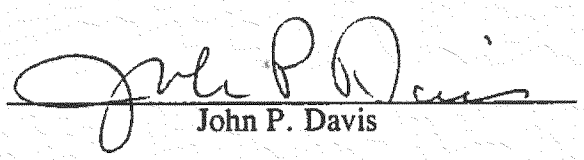


John P. Davis

A

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

GREGORY A. CHRISTIAN, *et al.*, Plaintiffs, v. BP AMOCO CORPORATION, *et al.*, ATLANTIC RICHFIELD COMPANY, *et al.*, Defendants.	Cause No. DV-08-173 Hon. Brad Newman **AFFIDAVIT OF MICHAEL MCLEOD**

I, Michael McLeod, being over the age of eighteen, make this Affidavit based upon my personal knowledge of the facts and circumstances stated herein, and state under oath as follows:

1. I am employed by TREC, Inc., and I am a Senior Geographic Information Systems ("GIS") Specialist.

2. I graduated from the University of Wyoming with a Bachelor of Science degree in Geography, and since then I have been utilizing GIS-related technologies for over 17 years to perform my primary duties of developing, maintaining, and publishing spatial data.

3. A GIS database is a system that uses computer software and hardware to store, organize, and display information geographically.

4. In connection with the above captioned litigation, I was hired by Atlantic Richfield Company ("Atlantic Richfield") to create and maintain a GIS database that would include certain geographic features for the area encompassing Opportunity and Crackerville, Montana.

5. I created and maintained the GIS database in accordance with applicable professional standards, and followed the guidelines set forth in the Data Management Plan for the Anaconda Smelter National Priorities List ("NPL") Site.

6. Exhibit 1, attached to this Affidavit, is a map that I derived from the GIS database. Exhibit 1 is a fair and accurate geographical representation of the locations of the Plaintiff parcels at issue in this lawsuit, as well as the geographic boundaries of the Anaconda Smelter NPL Site and the Silver Bow Creek/Butte Area NPL Site established by the U.S. Environmental Protection Agency.

7. To show the location of Plaintiff parcels in the GIS database, and on Exhibit 1, I incorporated parcel data from the Montana Department of Revenue's Cadastral GIS database (available at http://svc.mt.gov/msl/mtcadastral/). The property data in the Cadastral GIS database is derived from land records, and the Montana Department of Revenue uses this database in its tax assessment efforts, among other things.

8. As Exhibit 1 demonstrates, all Plaintiff parcels at issue in this lawsuit are located within the boundaries of the Anaconda Smelter NPL Site, with the exception of a portion of parcel number 87 and a portion of parcel number 89, which are located within the Silver Bow Creek/Butte Area NPL Site, Streamside Tailings Operable Unit. Parcels 87 and 89 are agricultural properties.

FURTHER AFFIANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16 day of May, 2013.

By: _____
Michael McLeod

Subscribed and sworn to before me this 16 day of May, 2013, by Michael McLeod.

Witness my hand and official seal.

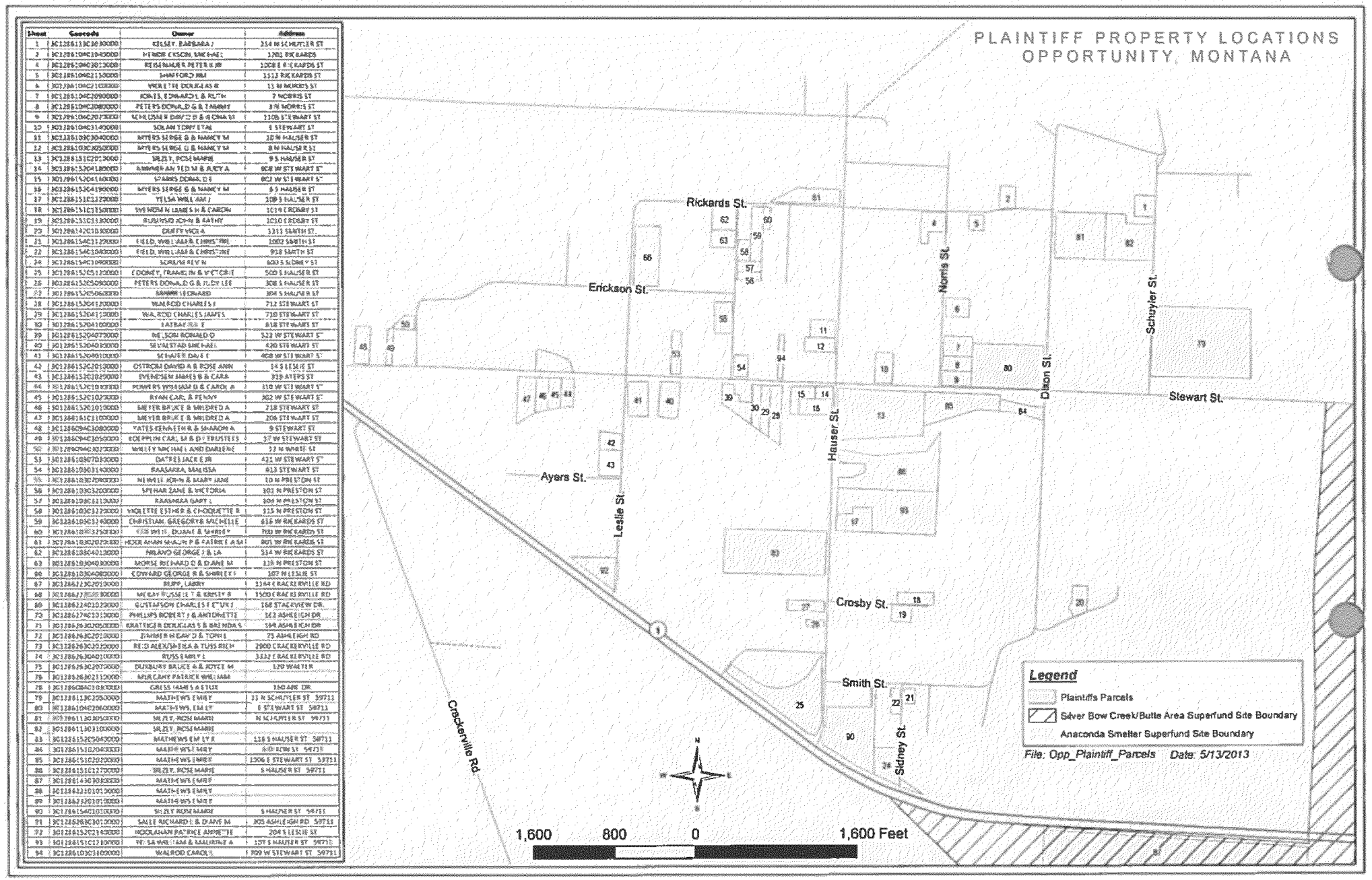
_____
Notary Public

My Commission Expires: 5-19-2015

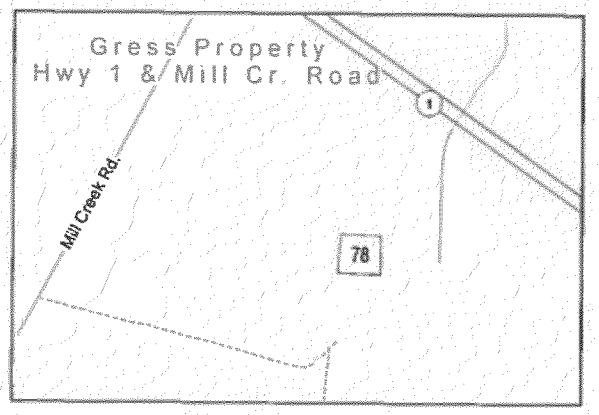
K. TAYLOR NOTARIAL SEAL STATE OF MONTANA

K. TAYLOR
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
May 19, 2015

Sheet	Geocode	Owner	Address
1	3012861130360000	KELSEY, BARBARA J	214 N SCHUYLER ST
2	3012861040190000	HENDRICKSON, SHEHAE	1701 RICHARDS
4	3012861040010000	REISHAUER PETER E JR	1208 E RICHARDS ST
5	3012861040210000	SHAFFORD JILL	1313 RICHARDS ST
6	3012861040210000	WHEELER DOUGLAS R	11 N MORRIS ST
7	3012861040090000	ROBERTS, EDWARD L & RUTH	7 MORRIS ST
8	3012861040080000	PETERS DONALD G & TAMMY	3 N MORRIS ST
9	3012861040070000	SCHELLSMAN DAVID & DONNA M	1108 E STEWART ST
10	3012861040140000	SOLAN TONY ETAL	6 STEWART ST
11	3012861030040000	MYERS SERGE G & NANCY M	10 N HAUSER ST
12	3012861030050000	MYERS SERGE G & NANCY M	8 N HAUSER ST
13	3012861510210000	WILEY, ROSE MARIE	9 S HAUSER ST
14	3012861520410000	SHANNAHAN TED M & JUDY A	808 W STEWART ST
15	3012861520410000	SPARKS DONALD H	807 W STEWART ST
16	3012861530410000	MYERS SERGE G & NANCY M	6 S HAUSER ST
17	3012861510210000	YELSA WILLIAM J	109 S HAUSER ST
18	3012861510150000	SWENSON JAMES H & CAROL	1019 E ROBERT ST
19	3012861310130000	RUSHMORE JOHN & KATHY	1010 E ROBERT ST
20	3012861420130000	DUFFY VICKI A	1311 SMITH ST.
21	3012861540210000	FIELD, WILLIAM & CHRISTINE	1002 SMITH ST
22	3012861540100000	FIELD, WILLIAM & CHRISTINE	918 SMITH ST
24	3012861540090000	SCHLING KEVIN	820 S SIDNEY ST
25	3012861520510000	CROONEY, FRANKLIN & WYETTE	509 S HAUSER ST
26	3012861520500000	PETERS DONALD G & RILEY LEE	308 S HAUSER ST
27	3012861520560000	BRAMM LORRAINE	304 S HAUSER ST
28	3012861520410000	WALROD CHARLES J	712 STEWART ST
29	3012861520410000	WALROD CHARLES JAMES	710 STEWART ST
30	3012861520410000	LAFRANCE E	618 STEWART ST
31	3012861520470000	NELSON RONALD D	523 W STEWART ST
40	3012861530480000	SELVESTAD MICHAEL	420 STEWART ST
41	3012861520480000	SCHAFER DALE E	408 W STEWART ST
42	3012861520210000	OSTROM DAVID A & ROSE ANN	314 S LESLIE ST
43	3012861520200000	SVENDSEN JAMES B & CARA	319 AYERS ST
44	3012861520100000	POWERS WILLIAM B & CAROL A	310 W STEWART ST
45	3012861520200000	RYAN CARL & PENNY	302 W STEWART ST
46	3012861520190000	MEYER BRUCE & MILDRED A	218 STEWART ST
47	3012861610100000	MEYER BRUCE & MILDRED A	206 STEWART ST
48	3012860940080000	YATES KENNETH R & SHARON A	9 STEWART ST
49	3012860940050000	KOEPPLIN CARL M & D TRUSTEES	37 W STEWART ST
50	3012860940020000	WHITEY MICHAEL AND DARLENE	22 N WHITE ST
53	3012861040700000	DAVIES JACK E JR	421 W STEWART ST
54	3012861030140000	RAASAKKA, MARISSA	613 STEWART ST
55	3012861030200000	NEWELL JOHN & MARY JANE	10 N PRESTON ST
56	3012861030320000	SPEHAR ZANE & VICTORIA	101 N PRESTON ST
57	3012861030210000	RAASAKKA GARY L	104 N PRESTON ST
58	3012861030320000	VIOLETTE ESTHER & CHOQUETTE R	115 N PRESTON ST
59	3012861030340000	CHRISTIAN, GREGORY & MICHELLE	616 W RICHARDS ST
60	3012861030350000	[illegible]	700 W RICHARDS ST
61	3012861030200000	HOEHNAN SHAUN P & PATRICE A SA	801 W RICHARDS ST
62	3012861030410000	PALADO GEORGE J & LA	514 W RICHARDS ST
63	3012861030490000	MORSE RICHARD D & DIANE M	119 N PRESTON ST
66	3012861030600000	EDWARD GEORGE R & SHIRLEY E	107 N LESLIE ST
67	3012862130210000	BURR, LARRY	2144 E RACE RKVILLE RD
68	3012862130180000	MCKAY RUSSELL T & KRISTY B	1500 E RACE RKVILLE RD
69	3012862140230000	GUSTAFSON CHARLES F ETUX	168 STACEVIEW DR.
73	3012862740130000	PHILLIPS ROBERT J & ANTOINETTE	163 ASHLEIGH DR
71	3012862630250000	KRATTIGER DOUGLAS S & BRENDA S	149 ASHLEIGH DR
72	3012862630210000	ZIMMERMAN D & TONI L	75 ASHLEIGH RD
73	3012862630250000	REID ALEX/SHEILA & TUSS RICH	2900 E RACE RKVILLE RD
74	3012862630410000	RUSS FAMILY L	3232 E RACE RKVILLE RD
75	3012862630270000	DUNBURY BRUCE A & JOYCE M	120 WALTER
76	3012862630210000	MURCARY PATRICK WILLIAM	
78	3012860840100000	GRESSMAN S A ETUX	160 ARK DR.
79	3012861130250000	MATHEWS EMILY	33 N SCHUYLER ST 59711
80	3012861040960000	MATHEWS, EMILY	E STEWART ST 59711
81	3012861130350000	WILEY, ROSE MARIE	N SCHUYLER ST 59711
82	3012861130130000	WILEY, ROSE MARIE	
83	3012861520940000	MATHEWS EMILY R	116 S HAUSER ST 59711
84	3012861510240000	MATHEWS EMILY	S HAUSER ST 59711
85	3012861510200000	MATHEWS EMILY	1306 E STEWART ST 59711
86	3012861511270000	WILEY, ROSE MARIE	S HAUSER ST 59711
87	3012861430300000	MATHEWS EMILY	
88	3012862210100000	MATHEWS EMILY	
89	3012862210150000	MATHEWS EMILY	
90	3012861540100000	WILEY ROSE MARIE	S HAUSER ST 59711
91	3012862630130000	SALLE RICHARD L & DIANE M	305 ASHLEIGH RD. 59711
92	3012861520140000	HOOLAHAN PATRICK ANNETTE	204 S LESLIE ST
93	3012861510190000	YELSA WILLIAM J & MARTHA A	107 S HAUSER ST 59711
94	3012861030160000	WALROD CAROL S	709 W STEWART ST 59711



PLAINTIFF PROPERTY LOCATIONS
CRACKERVILLE AREA, MONTANA



Legend

- Plaintiffs Parcels
- Silver Bow Creek/Butte Area Superfund Site Boundary
- Anaconda Smelter Superfund Site Boundary

Sheet	Geocode	Owner	Property Address
74	30128626304010000	RUSS EMILY L	3332 CRACKERVILLE RD
70	30128627401010000	PHILLIPS ROBERT J & ANTONETTE	162 ASHLEIGH DR
72	30128626302010000	ZIMMER H DAVID & TONI L	75 ASHLEIGH RD
73	30128626302020000	REID ALEX/SHEILA & TUSS RICH	2900 CRACKERVILLE RD
69	30128622401020000	GUSTAFSON CHARLES F ETUX J	168 STACKVIEW DR.
68	30128622302030000	MCKAY RUSSELL T & KRISTY R	1500 CRACKERVILLE RD
67	30128622302010000	RUPP, LARRY	1144 CRACKERVILLE RD
71	30128626302050000	KRATTIGER DOUGLAS S & BRENDA S	169 ASHLEIGH DR
75	30128626302070000	DUXBURY BRUCE A & JOYCE M	120 WALTER
76	30128626302110000	MULCAHY PATRICK WILLIAM	
78	30128608401030000	GRESS JAMES	160 ABC DR
87	30128614303030000	MATHEWS EMILY	
88	30128622101010000	MATHEWS EMILY	
89	30128623201010000	MATHEWS EMILY	
91	30128626303010000	SALLE RICHARD L & DIANE M	305 ASHLEIGH RD 59711

File: Crackerville_Plaintiff_Parcels Date: 5/13/2013

2,400 1,200 0 2,400 Feet

B

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

GREGORY A. CHRISTIAN, *et al.*, Plaintiffs, v. BP AMOCO CORPORATION, *et al.*, ATLANTIC RICHFIELD COMPANY, *et al.*, Defendants.	Cause No. DV-08-173 Hon. Brad Newman **AFFIDAVIT OF RICHARD E. BARTELT**

I, Richard E. Bartelt, being over the age of eighteen, make this affidavit based upon my personal knowledge of the facts and circumstances stated herein, and state under oath as follows:

1. I am employed by ARCADIS, U.S., Inc., a consulting and engineering company.

2. I received a Bachelor of Science Degree in Civil Engineering from Iowa State University in 1970, and a Master's Degree in Sanitary Engineering from Iowa State University in 1973. Upon graduation, I worked for the United States Environmental Protection Agency ("EPA"), Region 5, from 1973 to 1987.

3. Following the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") of 1980, I became the Region 5 Superfund Coordinator and Director of the Region 5 Emergency and Remedial Response Branch, where I was in charge of CERCLA removal and remedial actions for the Region.

4. Since leaving EPA, I have provided technical and programmatic consulting services for over 100 National Priorities List ("NPL") or "Superfund" sites throughout the country.

5. In connection with the above captioned litigation, I was hired by Atlantic Richfield Company ("Atlantic Richfield") to provide expert opinions concerning the CERCLA regulatory process at the Anaconda Smelter NPL Site ("the Site").

6. In rendering my opinions, I prepared an Expert Report ("Report"), dated April 2013, that contains my expert opinions regarding this case. I specifically incorporate that Report by reference and make it a part of this affidavit. The opinions I express in that Report are true, correct, and accurate to a reasonable degree of certainty. A copy of my Report is attached hereto as Exhibit 1. In my Report, I identify the hundreds of documents I reviewed in the course of my analysis and in forming my opinions in this matter. Some of the citations for the documents and sources supporting my statements in this affidavit are contained in my Report.

7. In 1982, EPA and Atlantic Richfield entered into a voluntary agreement to collect data regarding actual or threatened releases of heavy metals, including arsenic, lead, cadmium, zinc, beryllium, and copper, into the environment in and around the Anaconda Smelter. This agreement preceded formal listing of the Site on the NPL in September 1983.

8. Since those early investigations, Atlantic Richfield has cooperated with EPA, the Montana Department of Environmental Quality ("MDEQ"), and Anaconda-Deer Lodge County, on the extensive environmental investigation and cleanup at the Site.

9. In 1984, EPA issued its first Administrative Order to Atlantic Richfield. That order required Atlantic Richfield to perform a site-wide Remedial Investigation/Feasibility Study ("RI/FS"), which Atlantic Richfield completed in 1987.

10. EPA has since divided the Site into five Operable Units ("OUs"). The purpose of subdividing the Site was to identify potential response actions that could be started as soon as possible, and to make site investigation and cleanup more manageable. EPA has issued a Record

of Decision ("ROD") for each OU. The ROD is the document that identifies EPA's selected remedy for the particular OU.

11. The two OUs that directly apply to the Opportunity and Crackerville areas where the Plaintiffs reside are the Community Soils Operable Unit ("CSOU"), and the Anaconda Regional Water, Waste, and Soils Operable Unit ("ARWWS OU").

12. The CSOU was intended to address all residential soils (i.e., yards) impacted by past smelter operations, including residential soils in the communities of Opportunity and Crackerville.

13. The ARWWS OU was intended to be the last OU for the Site and to address all remaining contamination and impacts to surface and ground water, waste source areas, and non-residential soils not remediated under prior response actions for the other OUs.

14. EPA issued another Administrative Order to Atlantic Richfield in 1988, which superseded the 1984 order. The 1988 order is attached as Exhibit 2. As the order says in the first paragraph, EPA issued it pursuant to CERCLA section 104, 42 U.S.C. § 9604. Although EPA had previously initiated removal and remedial actions at the Site, the 1988 order was the first administrative order at the Site where EPA ordered Atlantic Richfield to perform work directly related to the Plaintiffs' properties.

15. EPA's 1988 order was amended in 1994 to require Atlantic Richfield to conduct separate RI/FSs for both CSOU and ARWWS OU (this Seventh Amendment to the 1988 order also is included in Exhibit 2). These OU-specific RI/FSs were completed by Atlantic Richfield in 1996.

16. EPA issued separate RODs for CSOU and ARWWS OU. EPA issued the CSOU ROD in 1996, and the ARWWS OU ROD in 1998. Pursuant to EPA's decisions in these RODs

and orders directing Atlantic Richfield to implement such decisions, Atlantic Richfield has performed a significant amount of remedial investigation and cleanup work at the Site.

17. Under the residential component of the CSOU ROD, which applies to the Plaintiffs' properties in this case, EPA required Atlantic Richfield to remediate residential soils that exceeded 250 parts per million ("ppm") of arsenic by removing soil to a depth of as much as 18 inches below the surface, and replacing it with clean soil and a vegetative cover.

18. Because the EPA determined that the contamination identified in the communities of Opportunity and Crackerville did not present a risk to human health or the environment sufficient to warrant inclusion in the CSOU focus area, testing of soils in those communities under the CSOU ROD was conducted on a voluntary basis.

19. At the request of residents, many of the yards in Opportunity and Crackerville, including some of the Plaintiffs' yards, were tested under this program. Yards that tested over 250 ppm arsenic (yard-weighted average) were remediated pursuant to the CSOU ROD.

20. Under the CSOU ROD, approximately 1,740 residences in Anaconda and the surrounding areas (including Opportunity and Crackerville) were sampled, and 350 yards where the average arsenic concentration for the yard exceeded 250 ppm arsenic were cleaned up.

21. Atlantic Richfield cleaned up two of the Plaintiffs' yards under the CSOU ROD, and has standing offers to clean up other Plaintiffs' properties based on testing conducted in connection with this lawsuit.

22. In 2012, EPA published a proposed plan for a CSOU ROD amendment to address concerns that arsenic and lead concentrations were higher in deeper soils than had been previously anticipated. The CSOU ROD amendment will require additional testing and potentially, additional cleanup of residential yards. The Plaintiffs' properties will be included within the area

covered by the ROD amendment. Upon completion of the ROD amendment, EPA will require Atlantic Richfield to perform the testing and any additional cleanup work that may be required by the amendment.

23. EPA also directed Atlantic Richfield to conduct work relating to Plaintiffs' properties through the ARWWS OU ROD. A 2011 amendment to the ARWWS ROD required testing and remediation of residential wells throughout the OU, including in Opportunity and Crackerville. Atlantic Richfield conducts a domestic well sampling and replacement program pursuant the ARWWS ROD Amendment, which ensures a safe drinking water supply for households within the OU. Since 2009, domestic well testing of Opportunity and Crackerville residents, including the Plaintiffs, has been performed by the Montana Bureau of Mines and Geology under a contract with Atlantic Richfield.

24. The Federal Safe Drinking Water Act Maximum Contaminant Level for arsenic is 10 parts per billion ("ppb"). The State of Montana also has a numeric water quality standard for surface and ground water of 10 ppb arsenic.

25. Under the ARWWS OU domestic well sampling program, if a domestic well tests below 5 ppb arsenic, no further action is taken. If a well tests over 5 ppb but under 10 ppb arsenic, the well is monitored annually for a period of three years to make certain it does not exceed 10 ppb arsenic. If a well tests over 10 ppb arsenic, the well is replaced and bottled water is provided to the homeowner in the interim until well replacement is complete and water quality is confirmed.

26. Two wells on properties owned by Plaintiffs tested above 10 ppb arsenic, and Atlantic Richfield replaced both of those wells pursuant to the ARWWS OU ROD Amendment.

27. Also under the ARWWS OU ROD, Atlantic Richfield has remediated large areas of non-residential soils, former disposal ponds associated with the smelter facility, fluvial tailings areas, and portions of Warm Springs Creek.

28. All of the work performed to date by Atlantic Richfield or its contractors to implement the CSOU and ARWWS OU RODs has been supervised and approved by EPA. The investigation and cleanup work under the CSOU ROD and the ARWWS OU ROD is ongoing.

29. I am familiar with the regulatory requirements for public participation and community input in a CERCLA cleanup that are contained in the National Oil and Hazardous Substances Pollution Contingency Plan, more commonly called the National Contingency Plan or the "NCP." From my analysis in this case, including an extensive review of the administrative record and interviews with EPA and MDEQ officials, I conclude that EPA, the State, and Atlantic Richfield have complied with the NCP's requirements for public participation. There is a substantial record of public participation and community involvement since the very beginning of the cleanup at this Site, including with respect to EPA's decisions concerning CSOU and ARWWS OU. The responsiveness summaries attendant to each of EPA's RODs for the Site document this commitment as early as 1983—before any CERCLA requirements for public participation had been specified. The public has had ample opportunity to comment on whether EPA's selected remedies for this Site are protective of human health and the environment as required by CERCLA.

30. The EPA maintains an Administrative Record for the Site, which contains tens of thousands of documents relating to the environmental investigation and cleanup that has been done and is being done. Since the Site was listed, EPA has issued six records of decision and

more than 25 separate administrative orders (not counting amendments) directing Atlantic Richfield to conduct CERCLA removal or remediation work at the Site.

31. I have reviewed the proposed remedies offered in the report of Plaintiffs' expert John R. Kane, dated April 15, 2013. EPA considered both soil and groundwater remedies similar to those proposed by Mr. Kane, but rejected such remedies in the course of its regulatory deliberations at the Site.

32. EPA established the action level of 250 ppm arsenic in residential soils after completing a human health risk assessment. In establishing the action level of 250 ppm arsenic, EPA considered a target risk range of screening levels from 3 ppm to 297 ppm (as described in the CSOU ROD). If EPA had chosen a lower action level, more extensive soil removal and yard replacements similar to the ones Mr. Kane proposes would have been required. However, EPA rejected such alternative action levels as unnecessary to protect human health and the environment.

33. In the process of selecting a remedy for groundwater and surface water in the Opportunity and Crackerville areas, EPA also considered in situ reactive walls similar to the passive reactive barrier wall ("PRB wall") proposed by Mr. Kane. In EPA's Technical Impracticability Evaluation Report entitled "Achievement of Arsenic Human Health Standard in Surface Water and Ground Water in the South Opportunity Area of Concern," EPA considered a permeable reactive barrier up-gradient of Opportunity that would use zero valiant iron as a material to remove arsenic, at a cost of nearly $60 million. However, EPA rejected such a barrier wall as unnecessary to protect human health and the environment.

FURTHER AFFIANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of May, 2013.

By: Richard E Bartelt
Richard E. Bartelt

Subscribed and sworn to before me this 16 day of MAY, 2013, by Richard Bartelt.

Witness my hand and official seal.

Pamela A. Thompson
Notary Public

My Commission Expires: 5-12-2014.

OFFICIAL SEAL
PAMELA A THOMPSON
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:05/12/14

MONTANA SECOND JUDICIAL DISTRICT COURT
SILVER BOW COUNTY

Christian, et al.

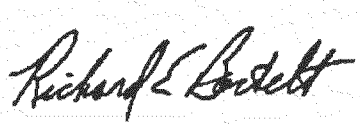
v.

BP Amoco Corporation, et al.
NO. DV-08-173 BN

EXPERT REPORT

OF

RICHARD E. BARTELT, P.E.



April 2013

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I. INTRODUCTION AND SUMMARY OF OPINIONS

This report presents the opinions that I, Richard E. Bartelt, anticipate providing in this matter. I have been requested to provide expert opinions on behalf of Defendants. My opinions are as follows:

1. Technology and regulatory requirements associated with disposal of hazardous wastes have evolved dramatically since the late 1970's. The passage of CERCLA resulted in the development of investigation and remediation processes not envisioned before 1980.
2. Scientific research and technology have improved field and analytical techniques since the late 1970's. Accordingly, an understanding of the science and the regulatory requirements to investigate and remediate contaminated sites during the relevant time period is crucial to evaluating the adequacy of early investigations and response actions.
3. Operations at the Anaconda Smelter Superfund Site (the Site) took place before environmental regulations regarding management, investigation and remediation of hazardous materials were in place.
4. From the outset, response actions at the Site have been directed and approved by United States Environmental Protection Agency (USEPA) with ongoing input and oversight from the State of Montana Department of Environmental Quality (the State).
5. Atlantic Richfield has conducted response actions at the Site to the satisfaction of USEPA and the State.
6. The response actions implemented at the Site have been consistent with the National Contingency Plan (NCP) and are protective of human health and the environment.
7. The responses taken at the Site have been iterative in nature as prescribed by the NCP and the 1988 RI/FS guidance.
8. Community involvement has been ongoing and consistent with the NCP since the initial responses at the Site began.
9. Since the remedies at the Site include the containment of hazardous substances, the remedies are subject to the formal Five-Year Review process to confirm the adequacy of

protection of human health and the environment. The Five-Year review process ensures and documents the commitment to implementation of the selected remedy and updates selected remedies as appropriate.

II. QUALIFICATIONS

In February 1970, I received a Bachelor of Science Degree in Civil Engineering from Iowa State University. After graduation I was commissioned in the United States Army and was assigned as a construction officer in the Chicago District of the U.S. Army Corps of Engineers. During that military service I worked as a contract manager for site development activities at the then Newport Army Ammunition Plant near Newport, Indiana and was awarded the Army Commendation Medal for those activities. I was honorably discharged from the army as a First Lieutenant in 1972. I entered graduate school at Iowa State University under a drinking water and wastewater treatment fellowship program funded by the USEPA and in 1973 received a Master of Engineering Degree in Sanitary Engineering. Upon graduation I accepted a position with USEPA Region 5 in Chicago and worked in that Region from November 1973 to May 1987.

My initial assignment with USEPA was as an environmental engineer in the Region 5 Water Division where I worked in the construction grants program which funded the planning, design and construction of municipal wastewater treatment facilities. In 1974, I helped develop and implement a program to evaluate the relationship between groundwater and sewer systems. In 1976, I was selected to serve as the Section Chief of the Groundwater Protection Section in the Water Supply Branch of the Region 5 Water Division. While managing that section, I was appointed to the national work group responsible for design and implementation of a study known as the "Surface Impoundment Assessment." The Surface Impoundment Assessment was a nationwide study of surface impoundments intended to inventory surface impoundments and to identify those impoundments that might pose a threat to groundwater. The assessment was also intended to evaluate the need for USEPA regulation of such impoundments. In 1978, while Chief of the Groundwater Protection Section, I began working on a regional program for identification of "Uncontrolled Hazardous Waste Sites" located in Region 5. Many of these sites would later be addressed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund). I was appointed Chief of the USEPA Region 5 Environmental Emergency Investigation Branch (EEIB) in 1980.

This assignment included management responsibility for the Region 5 Emergency Response Program. Management of the Emergency Response Program included review and approval of requests for funding for removal actions, monitoring of progress of removal actions, and administrative oversight of completion reports and documentation. As Chief of the EEIB, I also directed evaluations of numerous "hazardous waste sites" and was assigned as the Region 5 representative on the working group which USEPA convened to prepare for implementation of the pending Superfund legislation.

Following the enactment of CERCLA, I became the Region 5 Superfund Coordinator and Director of the Region 5 Office of Superfund. The Office of Superfund evolved over time into the Emergency and Remedial Response Branch (ERRB) and I served as chief of that branch or its predecessors from 1981 to 1987. While serving as Chief of the Region 5 ERRB, I was in charge of both removal and remedial actions for the Region. As Chief of the ERRB, I directed the development and implementation of the regional pre-remedial program which resulted in entering over 5,000 sites into the CERCLA Information System (CERCLIS). At the peak of the pre-remedial program, Region 5 was responsible for completing as many as 800 preliminary assessments (PAs) and 350 site inspections (SIs) a year. Working with USEPA headquarters personnel, I was the lead regional technical representative on the Record of Decision (ROD) work group. This group was responsible for developing the initial approach for preparing ROD's and for providing ROD training to regional Superfund program staff throughout the country. When I left USEPA Region 5 in May 1987, the Region 5 Superfund Program was the largest in the nation with several thousand sites in the CERCLIS database, more than 3,000 completed PAs, 1,200 completed SIs, over 200 sites on the National Priorities List (NPL), and over 150 completed CERCLA removal actions.

In addition to these responsibilities, while I managed the Region 5 Superfund program I was involved with the development and revision of the CERCLA National Oil and Hazardous Substances Pollution Contingency Plan (NCP). In 1980 CERCLA required that the then existing NCP be revised to reflect the requirements of CERCLA. The NCP was originally published in September 1968 and had subsequently been updated on various occasions to address the requirements of the Clean Water Act. The CERCLA revisions were required to incorporate a process for remediating "hazardous waste sites" under the new statute. I participated in work groups drafting the revised process and many of those recommendations were later

incorporated into the 1982 CERCLA revisions of the NCP. I was also a contributor to the November 1985 revisions to the NCP and was the principal Region 5 reviewer of proposed rule revisions during the regional signoff process.

After leaving USEPA, I spent one year with Dynamac Corporation working as a senior environmental engineer. In May of 1988, I joined Geraghty & Miller, Inc., as Vice President in charge of Engineering Services for the Midwest Region. I am currently a Senior Vice President serving as a National Expert for CERCLA Services for ARCADIS U.S., Inc., and am located in the ARCADIS office in Chicago, Illinois. In this capacity I am responsible for providing technical and regulatory support to ARCADIS project staff and clients in the areas of Federal, State and private party hazardous materials response under CERCLA and related statutes. I have managed and supported CERCLA projects throughout the country in all phases of response. Since leaving USEPA, I have been involved in providing technical and programmatic consulting services for over 100 National Priorities List (NPL) sites throughout the country and over 100 other sites where NCP compliance was a primary consideration in formulation and implementation of response plans and activities. Most recently I have been the lead in helping the United States Coast Guard develop an NCP compliant program for investigating and remediating Coast Guard owned properties prior to divestiture for return to non-federal ownership.

I have provided expert testimony relative to site investigation and remediation as well as compliance with NCP, including trial testimony on several occasions. A copy of my resume is attached for reference (Attachment 1).

III. CERCLA BACKGROUND

As background to my opinions a general overview of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), referred to as Superfund, is necessary.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, was enacted by Congress on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Over the initial five years of CERCLA, $1.6 billion was collected from taxes that went to a trust fund established for cleaning up hazardous waste sites. Among other things CERCLA:

- established prohibitions and requirements concerning hazardous waste sites;
- provided for liability of persons responsible for releases of hazardous waste at these sites; and
- established a trust fund to provide for cleanup of sites when no responsible party could be identified.

The law authorizes two kinds of response actions:

- Short-term removals, where actions may be taken to address releases or threatened releases requiring prompt response.
- Long-term remedial response actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. These actions when conducted by the government are only conducted at sites listed on EPA's NPL. Private parties may pursue remedial actions at non-NPL sites and the government may seek to have remedial actions taken at non-NPL sites.

CERCLA assigned the responsibility of remedy selection exclusively to the President and thus to USEPA (CERCLA § 104, §113 (k)(2)(B) and §121(9)) and required that states be

responsible to assure all future maintenance of the selected remedy for the expected life of the actions. (CERCLA §104 (c) (3)) CERCLA also required the revision of the National Contingency Plan. The NCP provided the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants. CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA) on October 17, 1986. SARA provided for a more defined process for evaluating site risks and screening and selecting remedies for responses (SARA Section 105(a). Sections 113 (k) and 117 of SARA also provided for enhanced public information and public participation and the requirement for five-year reviews for site where hazardous substances would remain on site. (Section 121(c)) Section 122 (e)(6) of SARA specified that when an administrative order or consent decree was in place a potentially responsible party may not initiate any remedial action unless such action has been authorized by the President.

CERCLA provides for the conduct of response actions and recovery of costs incurred for removal or remedial actions which are consistent with the NCP where response is to address a release or threatened release of a hazardous substance. The very first National Multi-Agency Oil and Hazardous Materials Pollution Contingency Plan was published in September 1968. The first NCP to address the specifics of hazardous substance response was finalized in July 1982 with 22 pages of preamble and 19 pages of rule. This NCP included reference to the recently promulgated CERCLA statute and was intended to guide response actions taken under the plan. The current operative version of the NCP, which is dated March 8, 1990, establishes procedures and standards for responding to releases of oil, hazardous substances, pollutants, and contaminants. The 1990 NCP is accompanied by 142 pages of preamble that also rely on 80 pages of preamble from the 1988 draft NCP proposed rules. The 1990 NCP includes 52 pages of response guidance. The 1990 NCP was supplemented in September 15, 1994 to include Oil Pollution Act changes. The state of the art and science on which the CERCLA program is based has developed and evolved substantially since 1982 as indicated by the increase in size of the NCP and attendant preambles The NCP is found at 40 CFR Part 300 and includes methods for discovering and investigating incidents and/or facilities at which hazardous substances have been disposed or otherwise come to be located as well as methods for evaluating and remedying releases or threats of releases from facilities which pose substantial danger to public health or the environment. The NCP is intended to provide a framework within which

USEPA project managers have the flexibility to use their best judgment, consonant with the applicable law, regulation and guidance. (55FR8674)

CERCLA required the development and maintenance of a list of facilities that constituted the sites warranting the highest priority for remedial action. This list is known as the National Priorities List (NPL). The NPL is routinely updated on an as needed basis. Qualifying sites may be listed on the NPL or in appropriate circumstances deferred from listing. Prior to response the USEPA has the option to enter into negotiations with potentially responsible parties (PRPs) to permit PRPs to conduct response actions of any kind. (55Fed. Reg. 8694, March 8, 1990) The USEPA may defer to states to permit state oversight of response actions. The first proposed NPL, published in December 1982, was required to contain at least 400 sites. Prior to that listing two preliminary lists had been developed, the Interim Priorities List (containing 115 sites) and the Extended Eligibility List (containing 45 sites). CERCLA was intended to address hazardous waste sites not otherwise regulated under the Resource Conservation and Recovery Act (RCRA), passed in 1976, or other statutes that would provide for investigation and remediation of hazardous substances pollutants or contaminants. The passage of RCRA and CERCLA in the late 1970s and early 1980s established the national framework for managing the generation, storage, treatment and disposal of hazardous materials and where necessary investigating and remediating sites and actual or threatened releases to the environment.

The NCP identifies the various steps that may be involved in the removal and remedial processes and allows a general comparison of how response actions are to proceed under each process. Removal actions are associated with the need for prompt action to respond to significant risk of harm to human life or health or to the environment (1988 NCP Preamble 53FR51404). Where a planning period of less than six months is available before on-site activities must begin, a time-critical removal may be taken. Where a time period of more than six months is available, a removal action may be taken but is to be preceded by the preparation of an engineering evaluation/cost analysis (EE/CA) and appropriate public participation (1988 53FR51409).

Remedial actions may be taken to address less urgent risks or threats and are typically preceded by substantial site characterization, risk assessment, the evaluation of alternatives and selection of a remedy. The approach to investigating situations not requiring urgent response are included in the NCP sections relating to EE/CA's and remedial investigation/feasibility studies (RI/FS). Remedial actions are those actions consistent with permanent remedy taken instead of, or in addition to, removal actions. (40 CFR 300.5)

Remedial actions can be taken at a site whether the site is listed on the NPL or not. Due to resource limitations the federal government usually pursues remedial actions only for NPL sites unless a potentially responsible party is willing to conduct the remedial actions without listing. Remedial actions are taken where time is available for evaluation and where releases or threatened releases are larger and more complex. Remedial actions are preceded by a remedial investigation (RI) which is intended to identify the nature and extent of contamination and the baseline risks posed by unremediated site conditions (1988 RI/FS Guidance). Once the site is characterized, alternatives are evaluated to identify protective and cost-effective response actions for addressing the identified site conditions. The process of identifying and screening alternatives results in the development of a feasibility study (FS). In screening down to the most promising alternatives, three criteria are initially used – effectiveness, implementability and cost. (1990 NCP Preamble, 55FR8712).

Individual alternatives surviving the initial screening undergo assessment against each of nine screening criteria which are categorized into three groups. The threshold criteria are: 1) overall protection of human health and the environment and 2) compliance with ARARs. The primary balancing criteria are: 3) long term effectiveness and permanence, 4) reduction of toxicity, mobility and volume, 5) short-term effectiveness, 6) implementability, and 7) cost. The last criteria are the modifying criteria: 8) state acceptance and 9) community acceptance. Final screening is based on evaluating each alternative against nine criteria which are identified in Section 300.430 of the NCP. Based on the detailed analysis of viable alternatives based on the nine evaluation criteria one alternative is identified as preferred by USEPA. This alternative, which may be a combination of a wide variety of response actions throughout a site or operable unit, is then published as a proposed plan and made available for public comment. USEPA selects the alternative that is the basis for the proposed plan. Where a PRP conducts the RI/FS a preferred or recommended alternative is not typically identified in the FS. Rather the analysis

of final alternatives is presented and EPA prepares the proposed plan that identifies the preferred alternative. The length of time required for the completion of an RI/FS and development of a proposed plan will depend on the size and complexity of the site and potential response actions.

The proposed plan is made available for public comment along with the administrative record that provides the basis for selection of the final remedy. Provision is made for a public meeting to discuss the remedy and to receive oral comments on the remedy. In some cases more than one public meeting may be held. Written comments are encouraged with the minimum comment period being not less than 30 days. Requests for extension of the comment period are typically honored. After reviewing the comments received, USEPA selects the final remedy and provides a summary of that remedy along with responses to all substantive comments and an explanation of how the selected remedy complies with the requirements of the NCP. The document that identifies the selected remedy and documents compliance with the NCP is known as the Record of Decision (ROD). If the remedy differs significantly from the proposed plan an explanation of those differences is provided in the ROD. Similarly, if over time conditions at a site change or new information regarding site conditions is developed necessitating modifications to the selected remedy, the NCP provides for changing the ROD by issuing an amendment or an explanation of significant differences (ESD). A ROD amendment requires the full complement of public participation opportunities including a public meeting and responses to comments received. The issuance of an ESD requires public notice and an explanation of the significance of the differences.

The 1988 NCP Preamble addresses the relationship between removal and remedial activities. (53FR 51405) This preamble notes that opting to pursue the remedial process does not prevent the identification of urgent actions and initiation of a removal action at any time during the remedial process. The goal is identified as addressing the most significant threats in the most efficient and effective manner.

Section 113(k) (1) of CERCLA requires the establishment of an administrative record that contains the documents that form the basis for selection of a response action under CERCLA as discussed above. According to the preamble to the 1988 proposed NCP, this administrative record is intended to include "information available to the decision maker at the

time the response was selected." (53FR51463) Judicial review of the selection of a response action is possible and is to be limited to the administrative record and focused on the information that was available to the decision maker.

IV. SITE HISTORY AND BACKGROUND

Smelting of ores from Butte commenced in the Anaconda area in 1884 at the Old Works just south of Stucky Ridge. Smelting was conducted there from 1884 until 1902. In 1902 the Old Works was taken out of service and smelting activities were moved to the Washoe Reduction Works, later called the Anaconda Reduction Works or just the Anaconda Smelter, and continued from 1902 until 1980. "In 1982 EPA and Anaconda (Atlantic Richfield Company) entered into a voluntary agreement to collect data regarding actual or threatened releases of heavy metals, including arsenic, lead, cadmium, zinc, beryllium, and copper, in and around the Anaconda Smelter Site into the environment." (October 1984 Administrative Order on Consent, Docket No. CERCLA-VIII-84-08). The Anaconda Smelter Site was identified as a potential candidate for CERCLA activity in 1980 and was finalized as an NPL site on the first formal National Priorities List on September 8, 1983. The 1982 agreement to further investigate the site actually preceded the formal listing of the Site on the NPL. As a result of site characterization activities, Atlantic Richfield and the agencies developed an understanding of the nature and extent of contamination at the Site.

The Site is extremely large and encompasses an area of over 300 square miles. The communities of Opportunity and Crackerville, where the plaintiffs in this case live, are encompassed within the Anaconda Smelter NPL site. As the understanding of site conditions and the CERCLA Program evolved over time the Site was divided into discrete response areas known as Operable Units (OU). By the time the first reference to OUs was introduced in the 1985 NCP proposed rules the concept had already been embraced at the Site. The number and description of OUs has varied over time as understanding of site conditions and approaches to response have evolved. The site is currently organized into five OUs with three of the OUs subdivided into sub-areas sometimes referred to as Remedial Design Units (RDU). The five OUs currently identified are (1) Mill Creek, (2) Flue Dust, (3) Old Works/East Anaconda Yards (subsequently divided into 6 sub-areas, (4) Community Soils and (5) Anaconda Regional Water, Waste and Soils (subdivided into 15 RDUs). The purpose of subdividing the site is to

help identify potential response actions that can be started as soon as site characterization allows and implemented to contribute to the final remedy for the site. The size and complexity of the Site combined with the fact that it is one of the first NPL sites has resulted in an evolving response that has been flexible and has been influenced by both technological and programmatic developments in the CERCLA program and the hazardous materials industry.

Wherever urgent needs for response were identified, and wherever information was available to formulate appropriate response actions, removal actions were considered. If removal actions were necessary and appropriate they were initiated in a timely manner. "Between 1983 and 1986 EPA provided oversight of the smelter demolition, on-site and off-site material transport, and initial stabilization efforts to control fugitive dust from waste sources." (January 6, 2000, EPA, Second Five-Year Review) While the USEPA Superfund Information System indicates that the first removal actions were site-wide in nature and were initiated in 1986, a closer review of the project files, as noted above, indicates that agreements were in place between EPA and Atlantic Richfield as early as 1982. On April 12, 1984 ARCO entered into an Administrative Order on Consent (AOC) to conduct demolition activities at the smelter, and in October of 1984 ARCO entered into another AOC to conduct further investigations to characterize soils, surface waters, groundwater and solid wastes. (September 30, 1996, EPA, Community Soils OU ROD) Removal actions with corresponding general dates are as follows:

1983-1986 Anaconda Smelter Demolition and Initial Stabilization
1986 Mill Creek Removal Activities
1991-1992 Anaconda Yards Removal
1991 Community Soils Removal
1992 Old Works Stabilization
1994 Arbiter Removal
1994 Beryllium Removal
1998 Warm Springs Creek Removal

Characterization of the Site has been an iterative process as is envisioned by the NCP and the appropriate CERCLA guidance. (55FR8720 and October 1988 RI/FS Guidance, Section 3.1). Re-scoping of the initially planned investigations to provide for additional site characterization and alternatives evaluation is commonplace. Over time, the Site has been

characterized, alternatives for response have been identified, and remedies have been selected and implemented. The agreements between EPA and Atlantic Richfield executed in the early 1980s were finalized before the substantive response provisions of the NCP were available, in particular the November 1985 NCP and the 1988 RI/FS Guidance.

One of the basic requirements of the CERCLA statute is that the public be kept informed regarding site conditions and response actions and that the public be provided an opportunity to provide information and input as sites are characterized and response actions are evaluated and selected. USEPA is primarily responsible for the public participation process and a Community Relations Plan for the Site was prepared in 1984 by an EPA contractor. Implementation of the plan has been supported by Atlantic Richfield. This plan was prepared before the first formal reference to the requirements for community relations was incorporated into the 1985 version of the NCP. "The purpose of the community relations program is to provide communities with accurate information about problems posed by releases of hazardous substances and give local officials and citizens the opportunity to comment on the technical solutions to the site problems." (50FR5880) As with the listing of the Anaconda Site on the NPL, where agreements had been reached and agreed to before program requirements had been finalized, the anticipated requirements for Community Relations were being implemented at the Site before they were required by the NCP.

At this time in 2013, the great majority of active remedial response for the Site has been completed. According to the Fourth Five-Year Review, there are nine issues regarding remediation that EPA believes require follow-up actions. As these issues are pursued it is possible that additional issues will be identified. This iterative process is the reason flexibility is a key component of the CERCLA response process. (55FR8700) It is anticipated that Atlantic Richfield, USEPA, MDEQ, local government and the public will continue to work cooperatively to address these nine issues and any others that arise from the Site. To date, four five-year reviews have been conducted. These reviews will continue indefinitely. The nature and extent of contamination at the Site is well established and systems are in place to continue monitoring and awareness of the risks posed by the Site. These systems envision future development of appropriate properties in the Anaconda area, consistent with the goals of CERCLA.

After Atlantic Richfield purchased The Anaconda Company in 1977, the smelter operated for approximately three more years. From the very beginning of the CERCLA program the Site has been categorized as a voluntary response. (December 30, 1982 FR Notice of first final NPL (47FR58476)). I am not aware of any significant enforcement activity that has been initiated to compel Atlantic Richfield to conduct response activities at the Site because of recalcitrance or any failure to comply with enforceable agreements, CERCLA or the NCP. Where Unilateral orders have been employed it is my understanding that these orders were mutually agreed upon in order to streamline the response process. Furthermore, I am not aware of any demand for penalties for late or non-performance of actions required under enforceable agreements between Atlantic Richfield and any of the governmental entities involved at the Site. EPA did issue one Notice of Violation to Atlantic Richfield in the early 1990's. This NOV was issued because Atlantic Richfield moved forward with some minor remediation work without waiting for EPA to review and approve the work. This is an admirable record for a response at this large and complex Site that has been active as long as it has.

V. FULL STATEMENT OF OPINIONS AND BASIS FOR OPINIONS

OPINION 1: Technology and regulatory requirements associated with the disposal of hazardous wastes have evolved dramatically since the late 1970's. The passage of CERCLA resulted in the development of investigation and remediation processes not envisioned before 1980.

1.1 BASIS OF OPINION: Prior to the passage of federal environmental regulations beginning with RCRA in 1976, most state and local laws imposed limited environmental, health and safety requirements. Requirements that were imposed were general in nature and typically did not require the detailed characterization, monitoring and reporting that present environmental requirements impose. As a result of this lack of detail and technical complexity, the responsibility for complying with environmental regulations, if they did in fact exist, fell to a relatively low level decision maker in an impacted organization. (Friedman, Frank B.; Practical Guide to Environmental Management, Environmental Law Institute, 2000) In the mining industry, for example, there were many companies operating in the 1960's and the 1970's that did not have formally organized environmental compliance units or environmental compliance procedures. The responsibility for finding disposal sites fell to

whoever in the organization ended up with custody of waste material when it was time to dispose of that material. Most early disposal sites were not scientifically sited or engineered based on desires to isolate disposed materials from the environment. Sites were located based on their remote nature, ease of access, the need for fill material and ease of dumping. In the 1960's and 1970's, neither the disposal site operator nor the waste generator typically had any requirement to keep environmental protection records.

Not until roughly the mid 1970's did federal and state statutes begin to provide the framework for regulating and monitoring the disposal of wastes. The passage of CERCLA in 1980 added additional emphasis to the development of technologies that would permit the investigation of disposal sites and an evaluation of the threats these sites might present. The technology for designing and operating landfills evolved greatly during the 1980's and into the 1990's as did the ability to investigate sites that were used before the new regulations had come into force and before technological developments could support the investigations.

The wide ranging liability provisions of CERCLA and the tightening technical requirements for disposal sites were accompanied by the need for generators of waste to investigate the quality and history of sites where disposal would be considered. This need became increasingly clear through the 1980's and today such due diligence is a standard part of not only deciding where to dispose of waste but also whether to buy, rent or lease industrial property for most any use. The Atlantic Richfield responses at the Anaconda Site are exemplary of these developments and by the early 1980's responses typically involved the careful characterization of sites used for disposal of wastes or soils impacted by mining/smelting wastes.

OPINION 2: Scientific research and technology have improved field and analytical techniques since the late 1970's. Accordingly, an understanding of the science and the regulatory requirements to investigate and remediate contaminated sites during the relevant time period is crucial to evaluating the adequacy of early investigations and response actions.

2.1 BASIS OF OPINION: As concerns for the environment and analytical capabilities have evolved over time various substances, naturally occurring and man-made, have come to the forefront of environmental awareness and priority. Ms. Judith Schoeck, Editor, Water

Information Center, Inc. of Geraghty & Miller, Inc. for the Fall/1988/Winter 1989 *Geraghty & Miller Fundamentals of Groundwater* training seminars identified the following sources as major recognized sources of groundwater contamination for the decades identified:

1930s: Salt-Water Intrusion

1940s: Industrial Heavy Metals

1950s: Septic Tanks & Cesspools

1960s: Garbage Dumps

1970s: Hazardous Wastes

1980s: Underground Storage Tanks

1990s: Pesticides and Herbicides

Looking at the contaminants/sources of concern over these decades it is obvious that the level of scientific sophistication required to investigate and evaluate the sources was increasing over the years. It is also significant that mining sites did not rise to the level of nation-wide priority that other sources attained. Concern for salt-water intrusion has been on-going but was enhanced in the 1930's by increasing populations and attendant demands on groundwater sources coupled with ever increasing pumping and delivery technology allowing large scale dependence on groundwater for large populations. By the 1970's increasing analytical capability coupled with the evolution of health effects research and the developing science of toxicology made hazardous wastes a growing concern that fostered legislation like CERCLA. The development of the hazardous waste management industry is a direct result of the evolution of enhanced analytical capability and expanded toxicological research of the 1980's and 1990's. Other significant developments in that timeframe are the capacity and capabilities of higher powered computers and the Internet. Prior to these innovations toxicological research was conducted in essence by hand and distributed in typed and copied form, essentially through professional journals and associations and through academic libraries. The lowering of analytical capability from parts per million to parts per billion and parts per trillion was also an evolutionary process that took place over many years. Routine analytical procedures producing reproducible and dependable results in the parts per million/parts per billion ranges were not routinely available in the early 1980's. Even when

such levels could be produced the accuracy and precision were generally questionable. (Superfund: A Six Year Perspective; USEPA, Office of Solid Waste and Emergency Response, October 1986; page 15)

Regulations evolved to reflect the state of the science associated with contaminants of evolving concern. Development of this regulatory infrastructure required time and considerable research. For instance in the late 1970's and early 1980's it was uncommon for the limited number of analytical laboratories that were available to produce consistently dependable analytical results for samples at the part per billion and parts per trillion levels. In addition even after receiving the results the industry did not have adequate information on the health implications of those levels. Today contaminants are relatively routinely tracked at parts per billion or parts per trillion levels. Just as detection levels and health effects information evolve over time so do regulatory programs. And indeed, the CERCLA process anticipates advancements in scientific technology and knowledge. As discussed in Opinion 9, if there are later advancements in detection technology or scientific understanding of what is necessary for protection of human health and the environment, the required remedy is to be altered as appropriate.

OPINION 3: Operations at the Anaconda Smelter Superfund Site took place before environmental regulations regarding management, investigation and remediation of hazardous materials were in place.

3.1 BASIS OF OPINION: Mining commenced in the Butte-Anaconda area in 1884 and smelting at the Old Works just South of Stucky Ridge was conducted from 1884 until 1902. At that time the Old Works was taken out of service and smelting activities were moved to the Washoe Reduction Works and continued from 1902 until 1980. The early versions of the Water Pollution Control Act (80-845) passed in 1948 and Amended in 1956 provided for studies of surface and underground water quality but did not provide for water quality standards or detailed regulatory requirements that would guide and regulate industrial operations or discharges. Similarly, the Solid Waste Disposal Act of 1965 which is a precursor to the Resource Conservation and Recovery Act (RCRA) (1976) did not provide detailed regulations to guide the handling and disposal of waste materials. Rather, at the time, the government was trying to

understand the actual and potential problems posed by the ever increasing volumes of municipal and industrial wastes as the population grew and the interface between people and wastes became more intense and common. Efforts to address air quality date to the Air Quality Act of 1967 and the Clean Air Act of 1970. Again these efforts did not specify requirements to be met but rather were aimed at understanding the problems at hand and initiating the process of setting standards for regions rather than specific industries and facilities. The recognition of Earth Day and the formulation of the USEPA in 1970 mark the point of concern for the environment that lead to the passage of more demanding and regulatory/enforcement oriented laws such as RCRA in 1976, the Toxic Substances Control Act and the Surface Mining and Reclamation Act in 1977, and finally the CERCLA in 1980. Since that time, RCRA and CERCLA have been amended and a comprehensive body of pertinent regulations and guidance has been developed. CERCLA provided for the revision of the existing NCP and in July 1982 the first CERCLA-driven NCP was published, which consisted of 22 pages of introductory preamble and 19 pages of regulation. The 1990 version of the NCP, which is the version that guides investigation and remediation today, was substantially more detailed and included 140 pages of explanatory preamble, supplemented by 80 pages specifying the process to be followed in responding to hazardous substance releases and sites. It is clear that the basis of the art and science of responding to the potential and actual threats posed by hazardous substance releases has grown dramatically since the passage of the key statues in the early 1980s.

The Anaconda Smelter Site was identified by the State of Montana as a site of concern in 1980 and was placed on the first NPL in 1983. In essence, investigations and remediation have been ongoing at the Site since 1980 when smelting ended. Prior to that time there was no accepted or required approach for determining the nature and extent of contamination at hazardous sites and similarly there was no well-established methodology for evaluating and quantifying the risks that sites posed to public health and/or the environment. The size and complexity of large mining/smelting sites dictated that time-consuming site characterization activities would be required before appropriate response actions could be identified, planned and implemented. The progress made at the Site is completely consistent with evolving nature of hazardous waste industry and the CERCLA program. The state of the art and science of the industry is dramatically different than it was in the early 1980s. There are over 100 mining and processing related sites that have been listed on the NPL. Of those only 13 have been

deleted—removed from the list with completed response actions. All of the sites that have been removed are only a few acres in size, which is extremely small when compared to the Anaconda Site.

OPINION 4: From the outset, response actions at the Site have been directed and approved by United States Environmental Protection Agency (USEPA) with ongoing input and oversight from the State of Montana Department of Environmental Quality.

4.1 BASIS OF OPINION: CERCLA assigns the responsibility of remedy selection to the President and thus USEPA exclusively and requires that states will be responsible to assure all future maintenance of the selected remedy for the expected life of the actions.

As noted above, the Anaconda Site was listed on the NPL in September 1983. "In 1982 EPA and Anaconda (Atlantic Richfield Corporation) entered into a voluntary agreement to collect data regarding actual or threatened releases of heavy metals, including arsenic, lead, cadmium, zinc, beryllium, and copper, in and around the Anaconda Smelter Site into the environment." (October 1984 Administrative Order on Consent, Docket No. CERCLA-VIII-84-08). Initial categorization of the nature of response actions at the Site was that Atlantic Richfield voluntarily responded. Atlantic Richfield was one of the first potentially responsible parties to enter into an agreement to conduct CERCLA-driven cleanup activities and entered into that agreement with the knowledge that the Site was very large and that response would be a complex undertaking that would take a very long time. Section 122(e)(6) of CERCLA bars any action by a private party at an NPL site where there is an enforcement agreement unless that action has been approved by the President (in this case USEPA). As a result Atlantic Richfield could not have taken actions at the Site independent of or without the prior authorization of EPA without facing repercussions.

There have been numerous agreements relative to response actions at the Site. The early agreements addressed demolition activities and site characterization. As more information was developed and the nature and extent of contamination at the Site became better understood, agreements were modified and supplemented to provide for organizing the Site into Operable Units. As the impacts of past activities were identified and quantified, risks were evaluated and quantified and response alternatives were screened and evaluated. Throughout

this process USEPA and the State directed, oversaw and had final approval of all activities. CERCLA provides that remedies will be selected by USEPA. USEPA and the State conducted the initial preliminary assessments and site investigations of the Site. With input from the State, USEPA developed the scope of the initial site characterization activities. As information about the Site became available, some scoping of future studies was prepared by Atlantic Richfield and its contractors, but in all cases work at the Site had to be approved by USEPA. Some activities were conducted by USEPA; most notably the evaluation of the technical impracticability of response actions to address the actual and potential impacts of contaminated soils on groundwater and contaminated groundwater on surface water.

The remediation of the Milltown Reservoir Sediments (OU 2 of the Milltown Reservoir Sediments/Clark Fork River Superfund Site) is an example of USEPA's exclusive authority for selection of a remedy under CERCLA. Atlantic Richfield took the lead in preparing the RI and FS for the Milltown Sediments OU. The RI was completed in 1995 and the FS report was released in 1996. After review by USEPA and the State and input from local stakeholders, a Focused Feasibility Study was prepared in 2000 and a Combined Feasibility Study was released in 2002. Initial evaluations conducted by Atlantic Richfield prior to 2002 addressed containing impacted sediments in place behind the Milltown Dam. USEPA ultimately determined that the most impacted sediments had to be removed, and in April 2003 USEPA released a Proposed Plan for the Milltown Reservoir Sediments OU that called for sediment removal by dredging and local disposal of dredged materials. As required by CERCLA, a public comment period was provided and a public meeting was held. USEPA reported that 4,029 comments, both oral and written, were received. (2004 USEPA Milltown ROD Fact Sheet). In response to the comments received, a revised plan was released in May 2004. The revised plan eliminated dredging in favor of rerouting the Clark Fork River and removing impacted soils and sediment through excavation. The plan eliminated most of the local disposal (approximately 230,000 cubic yards were disposed of locally in a repository at Tunnel Pond) and instead called for rail transport of excavated materials, most of which were sediments, back to the Butte/Anaconda area from which the sediments had originated. USEPA indicated that over 800 comments were received regarding the revised proposed plan and that 98% of these comments were supportive of the revised proposal. (2004 USEPA Milltown ROD Fact Sheet)

The Opportunity Ponds were designated as the new approved disposal location for Milltown Reservoir sediments. One of the justifications for disposal in the Opportunity Ponds included the preference for disposal at a location that was already dedicated to waste management. Use of a dedicated waste management area eliminated the need to use otherwise un-impacted land in Bandman Flats near the Milltown Dam for waste management. Rail transport was considered safe and not as intrusive as local or cross-county truck transport. After considerable deliberation, EPA determined that rail transportation and disposal of sediments on the Opportunity Ponds would be cost-effective and, as previously stated, would return the sediments to the place of their origin. EPA has also noted that while the volume of sediments from the Milltown Reservoir was significant, estimated at approximately 2,330,000 cubic yards (September 2011 Milltown First Five-Year Review), the volume was only a small fraction of the volume of material already in the ponds, which was estimated in the 2011 Anaconda Regional Water Waste and Soils OU ROD Amendment to be 129.3 million cubic yards. The Milltown Sediments thus comprise approximately 1.8% of the volume of the Opportunity Ponds. As noted above, Atlantic Richfield originally favored managing impacted sediments in place within the Milltown Reservoir, rather than transporting the sediments elsewhere. Upon USEPA's determination that the sediments must be removed, Atlantic Richfield in 2004 developed the dry removal and sediment dewatering approach that minimized the volume of materials to be returned to the Anaconda area and maximized protection of human health and the environment. The sediments returned from the Milltown Reservoir are less than 1% by volume of the mining and smelting wastes at the Site when compared to the total volume of mining related waste materials in the Anaconda area.

OPINION 5: Atlantic Richfield has conducted response actions at the Site to the satisfaction of USEPA and the State.

5.1 BASIS OF OPINION: I have reviewed numerous Administrative Orders on Consent, Unilateral Administrative Orders, Partial Consent Decrees and Consent Decrees that have been issued for response actions at the Site. All of these enforcement agreements include provision for monetary penalties in the form of civil penalties and/or punitive damages for failure to comply with the directions included in the agreement. I have reviewed the administrative record index for the Site and have inquired as to whether there have been any penalties or damages levied in association with response actions at the Site. [As explained above, a Notice of Violation was

issued in the early 1990's in response to remediation work Atlantic Richfield conducted without first waiting for EPA's review and approval.] No penalties have been assessed and no damages have been sought from Atlantic Richfield for either failure to comply with the directions included in the enforcement agreements or to meet the prescribed schedules. Based on my review of the materials made available to me I am not aware of any Notices of Violation of the provisions of the enforceable agreements associated with the implementation of response actions at the Site. These agreements provide the required scope of response actions and the anticipated schedules for implementation of the prescribed actions. Included in the scope of activities is the support of the community relations program to be implemented by USEPA. It is my opinion that Atlantic Richfield has complied with the required scopes of remediation work and schedules contained in the enforcement agreements pertinent to response actions at the Site.

OPINION 6: The response actions implemented at the Site have been consistent with the NCP and are protective of human health and the environment.

6.1 BASIS OF OPINION: CERCLA provides the USEPA with the authority to take response measures "consistent with the national contingency plan, which the President deems necessary to protect the public health or welfare or the environment." The President (USEPA) may allow a responsible party to conduct a response action if it is determined that the response "action will be done properly and promptly". (CERCLA 104(a)(1)) The CERCLA process prescribed in the NCP has been followed at the Anaconda Site. The enforcement agreements, the attendant scopes of work, and the work plans for the response actions implemented at the Site reference the NCP and the commitment to implement responses that are consistent with the NCP. These documents reflect the NCP process and the appropriate response guidance. Based on my review of the documents provided to me, my education and training, my understanding of the CERCLA process and attendant guidance and my 32 years of experience conducting, managing and reviewing CERCLA responses, it is my opinion that the response actions implemented by Atlantic Richfield and the USEPA, with full input from the State and the benefit of public input, are consistent with the NCP and have resulted in CERCLA–quality remedies that are protective of human health and the environment. As required by the NCP these remedies either meet the applicable or relevant and appropriate requirements of federal, state and local statutes and regulations or have received a waiver based on the conclusion that no alternative response could practically meet the specified requirements. Waivers typically

entail the use of institutional controls and monitoring that provide the requisite protection of human health and the environment. The specific remedies applicable to the plaintiffs' properties in this lawsuit are no exception.

Community Soils Operable Unit (OU 16)

It is important to consider the history of the two operable units (OU's) that most directly impact the Opportunity and Crackerville areas in which the plaintiffs in this case reside. On September 30, 1996 the Community Soils OU (OU 16) became the fourth OU to have remedial actions selected for implementation. The majority of the land in the OU is classified as rural. The RI/FS provided a procedural means to identify residential, commercial/industrial and railroad bed areas and to evaluate alternatives to remedy risks within the OU. There are five communities within the OU; Anaconda, Opportunity, Fairmont, Galen and Warm Springs. Also included are other residential areas within the Anaconda Smelter NPL Site. The Community Soils OU was intended to address all remaining residential and commercial/industrial soils impacted by past aerial emissions and railroad beds constructed of waste materials. (September 30, 1996 USEPA ROD for the Community Soils Operable Unit). This ROD established residential and commercial/industrial action levels for Arsenic for the whole Anaconda Smelter NPL Site, so that if arsenic in sampling results came back above the action level, further response actions would be taken.

The residential component required remediation of residential soils that exceed 250 ppm of arsenic in soil. Remediation included removal of soil to a depth of 18 inches below the ground surface and replacement with clean soil and a vegetative or other protective barrier. Where site conditions dictate that removal cannot be implemented, treatment or other measures will be taken to reduce arsenic levels to below the 250 ppm action level or to prevent exposure. Such alternative actions could include capping, tilling and/or institutional controls. The ROD provided for cleanup of all future residential soils in excess of 250 ppm arsenic at the time of development through the Anaconda/Deer Lodge Community Development Permit System. Institutional controls implementation includes provision of educational information to all residents which describes potential risks and recommendations to reduce exposure to residential contaminants in soils.

The residential component of the Community Soils OU applies to the plaintiffs in this case. Because EPA determined that the contamination identified in the communities of Opportunity and Crackerville did not present a sufficient risk to human health or the environment to warrant inclusion in the focus area, testing of soils in those communities under the ROD was on a voluntary basis. Nonetheless, many of the yards in Opportunity and Crackerville, including some of the plaintiffs' yards, were tested under this program. Yards that tested over 250 ppm (weighted average) in arsenic were remediated pursuant to the ROD.

The commercial component similarly required that soils in excess of 500 ppm of arsenic be addressed through a combination of revegetative techniques and/or engineered covers and that future development at sites with soils greater than 500 ppm at the time of development be addressed through the Anaconda Deer Lodge County Development Permit System. The approach to railroad beds was to construct engineered cover within the Anaconda community to prevent direct contact and to reduce potential for erosion transport of contaminated materials to residential properties and commercial industrial areas. Levels of 250 and 500 ppm of arsenic for residential and commercial railroad bed areas were to be addressed through the use of engineered covers. Railroad areas would be separated from residential and commercial/industrial areas with barriers to restrict access to the rail bed and to control surface runoff with curbing and retaining walls. Institutional controls would be maintained to restrict access and any future development.

When the proposed plan for the Community Soils OU was published it did not include all remaining current and future commercial/industrial land use areas throughout the NPL Site. These areas were added in the ROD and this significant difference was noted in the ROD. Similarly, as noted in the September 30, 2010 Fourth Five-Year Review, based on studies conducted in 2006 and 2007 regarding the presence of lead in soils and household dust, there was concern regarding exposures to lead in the area including at residences that had been previously remediated based on the arsenic action levels in place. The Five-Year Review indicated that further evaluations were required and that the protectiveness statement for the Community Soils OU was being withheld pending the results of further evaluation. In September 2012 USEPA published a proposal for a ROD amendment to address concerns that arsenic and lead were higher in deeper soils than had been previously anticipated, concerns for lead in yards that had not been cleaned up based on arsenic action levels and concerns related

to arsenic and lead in indoor dust in the community. Before the proposed plan was published approximately 1,740 residences in Anaconda and the surrounding rural area were sampled and 350 yards where the average arsenic concentration for the yard exceeded the 250 ppm residential use action level in the surface soil (0 to 2 inches) were cleaned up. (September 2012 USEPA Proposed Plan for ROD Modification Community Soils OU 16). The proposed plan addressed the stated concerns with the exception of arsenic levels in deeper soils which was to be deferred to the remedial design phase of the Community Soils OU. As a result of the studies leading up to proposed plan USEPA concluded that the original boundaries of the Anaconda Focus Area were too small and should be expanded, that additional consideration should be given to arsenic levels at deeper soil levels, that specific action levels for lead in soils should be developed and that protocols for addressing dust in living spaces should be developed. As a result, USEPA proposed a soil cleanup level for lead in residential soils of 700 ppm. Factoring these concerns into the remedy selection process the proposed plan resulted in the following proposed changes: 1) residential soils with lead in excess of 700 ppm (without regard to the source of lead) would be cleaned to 12 inches with no change for arsenic; 2) indoor dust arsenic > 250 ppm and lead > 700 ppm would be cleaned up; 3) (a) institutional controls in the Development Permit System (DPS) would be expanded to address residential remodeling and the Community Protective Measures Program (CPMP) would be expanded to include information on lead and (b) a multi-pathways program would be developed, working with local government to meet community needs. Industrial/commercial properties were not addressed in this proposed amendment and engineered covers for active railroad beds and yards are still required. Inactive beds and yards will be removed and disposed of under another OU.

As the chronology above demonstrates, the CERCLA process at the Site—including the Five-Year Review process—not only provides for the selection of remedies and regular reporting on operation of the selected remedies, but also provides for oversight of their implementation and protectiveness. When new technology or standards are developed, revisiting the selected remedies every five years ensures evaluation of operational data and, if necessary, collection and evaluation of additional data, through an independent review of the protectiveness of the remedies in place or being implemented. USEPA as the lead agency for the Site has the responsibility to evaluate the implementation and performance of remedies and to conduct studies or investigations necessary to verify that human health and the environment are being protected. Just as the remedy selection process is subject to mandatory public

participation, the Five-Year Review Process incorporates interviews with local stakeholders and the opportunity for the public to comment and indenfity concerns. Public input in the Five-Year Review Process is taken seriously by USEPA and Atlantic Richfield. Stakeholder interviews are a critical part of the Five-Year Review process and studies or investigations may be conducted in response to concerns raised by local stakeholders.

Anaconda Regional Water Waste and Soils Operable Unit 4 (OU 4)

The Anaconda Regional Water Waste and Soils Operable Unit 4 (OU 4) is the largest and most complex OU of the Anaconda Smelter NPL Site covering approximately 300 square miles of southern Deer Lodge Valley and the surrounding foothills. The area consists of agricultural, pasture, rangeland, forests, and riparian and wetland areas which contain wastes, slag, tailings, debris, and contaminated soil, groundwater, and surface water from copper and other metal ore milling, smelting, and refining operations. The ARWWS OU combines the former Anaconda Regional Water and Waste OU, the Anaconda Soils OU, and the Smelter Hill OU such that independent remedial actions are not required under the previously identified Anaconda Soils and Smelter Hill OUs.

The Administrative Record upon which the September 29, 1998 ARWWS OU 4 ROD is based includes three Remedial Investigations (RIs) and five Feasibility Study (FS) deliverables, human health and ecological risk assessments, the Proposed Plan, and public comments received, including those from Atlantic Richfield and EPA responses. The ARWWS OU ROD was intended to address the culmination of cleanup decisions encompassing potential impacts to surface water and groundwater from soils and waste sources such as tailings and slag. In addition, the ROD was to address risks to human health and the environment associated with arsenic in soils that had not been addressed by other response actions. The ARWWS OU is intended to be the last OU for the Site and is intended to address all remaining contamination and impacts to surface and groundwater, waste source areas (e.g., slag and tailings) and non-residential soils not remediated under prior response actions. The ROD was intended to facilitate coordination of land use decisions made by the Anaconda-Deer Lodge County through adoption of a Master Plan/Growth Policy and Development Permit System, to address land ownership by the PRP (Atlantic Richfield Company (ARCO)), and to address long-term maintenance of wastes-left-in-place through designation of Waste Management Areas, and to

facilitate use of institutional controls to support protective engineering remedies specified in the final ROD.

The nature of the ARWWS OU dictated that the remedial investigation and feasibility work for the OU would be a cooperative effort, and accordingly the RI/FS work was conducted by both Atlantic Richfield and USEPA. The Operable Unit History Section of the ROD details the evolution of the final definition of the OU as well as a basic summary of the authors of RI, FS and Risk Assessment efforts that lead up to the 1998 ROD. Also included is a summary of public participation activities that resulted in the Responsiveness Summary included with the final ROD. As part of the ROD, EPA subdivided the ARWWS OU into five subareas; 1) Opportunity Ponds; 2) North Opportunity Subarea; 3) South Opportunity Subarea; 4) Old Works/Stucky Ridge; and 5) Smelter Hill. Due to the size of the ARWWS OU, the OU has been further subdivided into 15 remedial design units (RDUs) plus two expansion areas.

As noted above, the original ROD was issued September 29, 1998 and included remedies to address soils and waste materials by reducing surface arsenic concentrations to below designated action levels of 250 ppm in residential areas, 500 ppm in commercial/industrial areas and 1000 ppm in recreational/agricultural areas. (As a result of the September, 2011 ROD Amendment, action levels for specified steep slopes and open areas were identified as 2500 ppm.) In addition to removal and disposal in specified waste management areas, reclamation of soils and waste area contamination was also possible through establishment of vegetative covers intended to prevent transport of contaminants of concern to groundwater or windborne and surface erosion to surface waters. Excavated areas were to be filled and graded with clean backfill followed by vegetation, particularly for areas adjacent to streams. Alluvial groundwater underlying portions of the Old Works and the South Opportunity Subarea was to be cleaned to Montana water quality standards through the combination of soil covers, source removal and natural attenuation. Bedrock aquifers and a portion of the alluvial system in the Old Works, Stucky Ridge and Smelter Hill subareas were determined to be not practicably remediated and a waiver of the cleanup standard was issued for these areas. Reclamation of soils and waste source areas with vegetation was required to minimize arsenic and cadmium movement into the aquifers. For portions of the valley alluvial aquifers where groundwater was below waste-left-in-place, point of compliance monitoring was required to ensure contamination was contained to the perimeter of designated waste

management areas. Where excursions were identified treatment options are to be required where practicable. The ROD also called for measures to address surface water contamination through implementation of measures to control runoff,selective removal of source material, and stream bank stabilization. Removed materials were to be disposed in waste management areas. Necessary institutional controls were to be identified and implemented, including, but not limited to, the Development Permit System, the Community Protective Measures Program, and ongoing monitoring of groundwater and surface water. The intent was ultimately to have institutional controls implemented and managed at the local government level.

Following the issuance of the 1998 ARWWS OU 4 ROD, investigation and monitoring at the Site continued as documented in the December 1999 Second Five-Year Review and the September 2005 Third Five-Year Review. In December 2009 USEPA published a proposed plan for the amendment of the ARWWS OU 4 ROD to reflect changes to the Safe Drinking Water Act Maximum Contaminant Level (MCL) for arsenic, which was lowered from 50 micrograms per liter (µg/L) to 10 µg/L. The State of Montana lowered its human health numeric water quality standard for surface and ground water from 20 µg/L and 18 µg/L, respectively, to 10 µg/L (numeric water quality standards set forth in Circular WQB-7).The changes significantly increased the area in which ground water was considered to be contaminated. In addition, as a result of design data collection activities and other site characterization efforts, the Amendment to the 1998 ROD issued by USEPA in September 2011 addressed modified or additionally-required responses impacting wastes and soils, groundwater and surface water. Under the Amendment, various waste management areas were finally located, combined or expanded. In addition, the Uplands Soils Area of Concern was expanded and the Dutchman and Smelter Hills High Arsenic Areas with concentrations in excess of 1000 ppm arsenic were designated. Additional removals were identified for abandoned railroad wastes and for the Blue Lagoon and Yellow Ditch response and the Warm Springs Creek remedy was significantly expanded. On the basis of the additional data collected and the revised standards, various points of compliance were relocated to monitor and protect groundwater from migration away from controlled areas. By the time of ROD Amendment, Atlantic Richfield had constructed a Groundwater/Surface Water Management System along a portion of the toe of the Opportunity Ponds to address potential migration of arsenic in groundwater as a component of the selected remedy.

The ROD Amendment also provided for a Domestic Well Monitoring and Replacement Program to monitor potentially vulnerable domestic wells in or adjacent to Controlled Groundwater Areas to ensure that these water supplies were safe and to replace them if necessary in the event that trigger levels or standards were exceeded. Under this program, a Domestic Well Area of Concern is identified and domestic wells can be tested. Where contamination in excess of the maximum contaminant level is confirmed, an alternative water supply will be provided. In the event that a new well is appropriate, the Montana Bureau of Mines and Geology will oversee replacement well construction by a qualified well installer and confirm the quality of water provided by the new well. The program also provides for involvement the Anaconda Deer Lodge County Health Department in investigating non-Superfund related contamination. Under the ROD Amendment, groundwater and surface water standards were updated to incorporate current federal and State requirements, and arsenic standards were waived for certain limited Technical Impracticability Zones. The Amendment documents the ongoing commitment to monitor and investigate the nature and extent of contamination at the Site and to evaluate the adequacy of the selected remedies for the purpose of protecting human health and the environment. The result of the Amendment, which was developed and issued with full opportunity for public input, was to implement changes to selected remedies that USEPA identified and determined to be necessary. The additional cost of these changes was recognized as potentially significant in the proposed plan issued in December 2009. The ROD Amendment, however, indicated, in the discussion of cost-effectiveness, that anticipated increased costs (which had not been estimated and documented in detail) were not expected to exceed the range estimate at the time of the 1998 ROD. That range was estimated to be between $88,000,000 and $150,000,000. Without the benefit of detailed estimating, the Amendment was issued with USEPA's indication that the additional costs were unlikely to exceed the $62,000,000 range of the 1998 estimate. Atlantic Richfield has continued to pursue implementation of this Amendment and in the case of the Groundwater/Surface Water Management System, with USEPA approval, initiated implementation before the ROD was revised. The changes to the 1998 ROD were initiated at the direction of USEPA and will be jointly implemented by Atlantic Richfield, the local community, various State agencies and USEPA. The Amendment clearly documents the ingenuity and commitment of all local stakeholders to go beyond the minimum requirements to implement innovative solutions in the Anaconda area that are protective of human health, the environment and the welfare of the local community.

The ARWWS ROD also applies to the property of the plaintiffs in this case. Atlantic Richfield initially on a voluntary basis, and later as a mandatory program under the ROD Amendment, tested the domestic wells of Opportunity and Crackerville residents, including the plaintiffs on a regular basis. Since 2009, the testing has been performed by the Montana Bureau of Mines and Geology. If the well tests under 5 ppb arsenic, it is considered clean and no further action is taken. If it tests over 5 but under 10 ppb arsenic, the well is monitored annually for a period of 3 years to make certain it does not exceed 10 ppb. If the well tests over 10 ppb arsenic, the well is replaced and bottled water is provided to the homeowner in the interim until replacement is complete and water quality is confirmed.

OPINION 7: The responses taken at the Site have been iterative in nature as prescribed by the NCP and the 1988 RI/FS guidance.

7.1 **BASIS OF OPINION:** The purpose of conducting an RI is to determine the nature and extent of contamination "such that informed decisions can be made as to the level of risk presented by the site and the appropriate type(s) of remedial response." "An iterative monitoring process is then implemented so that, by using increasingly accurate analytical techniques, the locations and concentrations of contaminants that have migrated into the environment can be documented." (Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA, USEPA, September 1988). The Anaconda Smelter Site was one of the first Superfund remedial responses to be undertaken and one of the first mining/smelting "mega" sites as well. Work at the Site began as early as 1982, before the current RI/FS guidance was available. (1982 Preliminary Evaluation, Fred C. Hart). As a result of the magnitude of the challenges posed by the Site, the initial enforcement agreements required that the Site first be initially characterized and fully anticipated subsequent site characterization efforts based on the findings of the initial investigations. Work by the Anaconda Minerals Company began in 1983. (Comprehensive Environmental Study "Screening Study: Anaconda Smelter Site", May 1, 1983). The preface to the RI/FS Work Plan that was attached to the October 22, 1984 Administrative Order clearly stated that "EPA and [Anaconda Minerals Company] recognize the need to undertake additional studies" that were not defined at that time but that would be agreed upon and initiated on "an expedited basis" as necessary. (September

1984 AOC, page ii). What was initially known was that characterizing the Site would be an evolving process that would identify the impacts of past activities, the risks posed by those impacts, and ultimately the response actions necessary to address those activities. Characterization of the Site has been ongoing since 1982, and response actions to address risks posed by the Site have taken the form of various removal and remedial actions. Where response actions were determined to be urgent, time critical removals and non-time critical removals have been conducted as provided by the NCP. Similarly, where necessary and appropriate, operable units have been identified to allow for focus and more timely initiation of responses. The 1985 NCP anticipated that the initial scope of remedial investigations would often have to be expanded, "During the remedial investigation, the original scoping of the project may be modified based on the factors in 300.68 (e)". (November 20, 1985 Final Rule NCP, 50FR47973). One of the factors identified in 300.68 (e) is the extent to which the substances have migrated or are expected to migrate from the area of their original location." (50FR47974) The December 21, 1988 Draft Proposed NCP at 300.430 (a) (2) also envisioned that the RI/FS process would be flexible, "The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered." (53FR51503) The language in the draft rule carried over unchanged in Section 300.430 (a) (2) of the 1990 NCP that now governs response actions. (55FR8846)

Because of the uncertainties associated with the RI/FS process neither the RI/FS Guidance nor the various versions of the NCP specify an anticipated duration for conduct of response actions. The reason for this is that each site is unique and poses unforeseen challenges that cannot be predicted. Many of the sites originally listed on the first NPL are still undergoing response actions. The process followed at the Anaconda Site is the process prescribed under CERCLA and is reasonable and appropriate for the scope and complexity of the identified site conditions.

OPINION 8: Community involvement has been ongoing and consistent with the NCP since the initial responses at the Site began.

8.1 BASIS OF OPINION: Section 113 (j) (2) of CERCLA identifies "Participation Procedures" for removal and remedial actions. Section 117 of CERCLA requires the opportunity for comment on a proposed response and that a response be provided for any

significant comments received. The first NCP to address the requirements of CERCLA, published July 16, 1982 (FR4731180), did not address expectations for public information or participation. The first references to community relations and public comment on remedy appear in the February 12, 1985 NCP Proposed Rules. (50FR5880). The September 22, 1984 administrative order was already in force at the Site when this first reference to public participation was incorporated into the NCP process. Section 25 of the 1984 order included the provision for public review and comment on the draft RI and FS reports. Section 45 of the December 20, 1985 "Flue Dust" Order provides that upon the last signature to the order availability of the order would be published in newspaper of general circulation to provide for review and comment by the public. Before the initial NPL was finalized in the Federal Register, the public, as required by CERCLA, had the opportunity to comment on the Site and related concerns. After the enforcement agreements were executed the responsibility for development of a Community Relations Plan belonged to USEPA, a Community Relations Plan was prepared by USEPA's contractor CH2M Hill in 1984. Various enforcement agreements between USEPA and Atlantic Richfield assigned responsibility to support the community information process to Atlantic Richfield. The Responsiveness Summary to the March 8, 1994 Old Works East Anaconda Development Area OU 07 Record of Decision indicates that, "Since 1983, EPA and [Montana Department of Health and Environmental Services] have produced a series of Progress Reports and Fact Sheets that discuss issues at the Anaconda Smelter NPL Site". Accordingly from the very outset of response activities, the public has had access to information and a form for input to the scoping of site characterization and the selection of remedies. The OWEADA OU ROD also provides a general chronology of public information. The September 30, 1996 Community Soils OU ROD identifies several community groups that were involved in providing input to site characterization and remedy selection including the Anaconda-Deer Lodge Environmental Advisory Council, Citizens in Action (Anaconda-Deer Lodge Reclamation Advocates), the Arrowhead Foundation, and Opportunity Concerned Citizens. The September 29, 1998 Anaconda Water Waste and Soils OU Record of Decision responsiveness summary references the 1984 Community Relations Plan and a 1992 update. The ARWWS ROD also notes that interviews conducted by USEPA indicated that as part of the Community Relations Plan Amendment process, interviewees stressed that they heard from ARCO frequently, largely due to ARCO's office being located in Anaconda.

Atlantic Richfield, USEPA and the State take seriously the need to provide public information and public comment opportunities. The responsiveness summaries attendant to each of the RODs produced for selected remedies at the Site document this commitment as early as 1983—before any CERCLA requirements for public participation had been specified. The purpose of the public comment process is to allow citizens to raise questions and objections to all aspects of remedy selection. The adequacy of site characterization (nature and extent of contamination), assessment of risk to human health and the environment, and the appropriateness and extent of a remedy may all be questioned, and the USEPA is required to provide a substantive response to any significant questions or comments. Section 300.430 (f), in particular sections 300.430 (f) (2), (3) and (4), provides the requirements for remedy selection. It is my opinion that these requirements have been followed and as a result the selected remedy is documented to be consistent with the NCP. Accordingly, the public has had ample opportunity to comment on whether the selected remedies are protective of human health and the environment as required by CERCLA.

The level of communication between the public, local governments, regulators and the responding private party, Atlantic Richfield, on this project is exemplary. I found the substance and tone of comments provided in conjunction with proposed remedy reviews to be constructive and in many instances appreciative. In my experience this type of input is only likely when the public has been consistently well informed and included in the remedy selection process.

OPINION 9: Since the remedies at the Site include the containment of hazardous substances, the remedies are subject to the formal Five-Year Review process to confirm the adequacy of protection of human health and the environment. The Five-Year review process ensures and documents the commitment to implementation of the selected remedy and updates selected remedies as appropriate.

9.1 BASIS FOR OPINION: CERCLA 121(c) provides for a review of any remedial action that results in any hazardous substances, pollutants or contaminants remaining at the site. The NCP addresses the expectations for five-year reviews in Section 300.430 (f) (4) (ii). Such review shall be conducted no less than each 5 years after the initiation of the remedial action to

assure that human health and the environment are being protected by the remedial action being implemented. The USEPA published Comprehensive Five-Year Review Guidance in June 2001.

To date, four five-year reviews have been completed. The five-year reviews document USEPA's ongoing oversight of the protectiveness of implemented remedies and the progress being made to address outstanding issues at the Site. Community interviews are conducted as part of the five-year review process, providing yet another opportunity for the public to raise concerns and to comment on progress at the Site. The conduct of the most recent interviews was announced in the Anaconda Leader on April 16, 2010. In addition to the newspaper advertisement, a large group of interested parties which included community groups, public and private institutions, and known interested individuals, were invited to participate and to encourage other interested parties to participate. As part of the interview process approximately 25 people were interviewed.

As a part of the review process, each of the five operable units was evaluated. This evaluation included a discussion of how the selected remedy has been implemented to date, the progress that has been made since the last five-year review, the various aspects of a technical assessment (is remedy functioning as proposed, have assumptions made at the time of remedy selection proved to be valid, has new information come to light requiring additional evaluation or changes), and identification of issues and recommendations. Finally the assessment of protectiveness of responses to date is provided in a protectiveness summary. Each OU and all remedial design units within each OU are evaluated and any necessary additions or changes are identified and documented. In essence, the five-year review provides a summary of progress to date and identifies the response activities that will be pursued going forward. As time has passed and the CERCLA program has evolved, the focus of the five-year review has also been refined. The focus of these reviews is also refined based on the input of the public and interested stakeholders. In fact, any interested party has the opportunity to become involved and raise issues that EPA will then consider in the five-year review.

The five year review is a critical evaluation of the progress being made toward completion of the implementation of the selected remedy. Where there are needs for the collection of additional information or where there is a need to alter or supplement a selected remedy these needs will be documented and USEPA and the responding party, in this case

Atlantic Richfield, will be required to take the necessary steps to address the identified issues and recommendations. As necessary, scopes of work or enforcement agreements will be modified to reflect the conclusions of the five–year reviews. For example, the latest and fourth five-year review indentified necessary additional activities required to complete the remediation of the Smelter Hill Facilities Remedial Design Unit. Repositories had been constructed within this area in the 1990s and the new Beryllium repository was constructed in 2004. The ARWWS OU ROD was issued in 1998. Following the finalization of the fourth five year review in September 2010, the Smelter Hill Facility administrative order was completed in June of 2011 and addresses necessary activities identified in the five-year review.

The proposed plan for a Community Soils OU ROD amendment discussed in Opinion 6 is an example of the commitment of USEPA, the State and Atlantic Richfield to update and modify the selected remedies as new information, regulations and/or technology are developed. This proposed plan incorporates changes in regulatory standards for lead in deeper soils, lead in yards that were not cleaned up, and arsenic and lead in indoor dust.

VI. COMPENSATION

For the services associated with this assignment, ARCADIS U.S., Inc. is being compensated at a rate of $350 per hour.

VII. PRIOR TESTIMONY

The other cases in which I have given trial or deposition testimony within the past four years are as follows:

Name of Case	Court	Trial or Deposition Testimony
Palmer, et al v. 3M Company Civil File No. C2-04-6309	State of Minnesota District Court County of Washington Tenth Judicial District	Deposition – July 30, 2008 Trial - June 3-4, 2009
Coffey Et Al. v. Freeport-McMoRan Copper & Gold Inc., Et Al. Case No. CJ-2008-68	State of Oklahoma District Court of Kay County	Affidavit - December 13, 2010 Deposition – January 5, 2011
Doe Run Resources v. Continental Casualty and Certain Underwriters at Lloyd's of London	Circuit Court for the County of St. Louis, State of Missouri	Deposition - April 7, 2011

VIII. PUBLICATIONS

Cost-Effective NCP Compliance for the Lead Agency - An Overview, Richard E. Bartelt, P.E., ARCADIS U.S., Inc., 2009, prepared for United States Coast Guard Civil Engineering Unit Cleveland.

Successful In-situ Treatment of Chromium Contaminated Groundwater for Former West Pullman Works, submitted to AWMA 2008 Martin J. Hamper, P.G., Richard E. Bartelt, P.E.

From Misery to Electric Energy: A Brownfields Success Story West Pullman Works, Gregory A. Vanderlaan, Richard E. Bartelt, P.E., et al., AWMA 2011.

25 Years of CERCLA and Counting, Richard E. Bartelt, P.E., ARCADIS U.S., Inc. January 16, 2006, Air and Waste Management Association

Attachment 1

ARCADIS

Education
ME, Sanitary Engineering, Iowa State University, 1973
BS, Civil Engineering, Iowa State University, 1970

Years of Experience
Total - 30
With ARCADIS - 22

Professional Registrations
Professional Engineer, IL, since 1975
USEPA 40-Hour Hazardous Materials Incident Response

Professional Associations
American Society of Civil Engineers
Society of American Military Engineers (SAME)

Richard E. Bartelt, PE

Senior Vice President

Richard Bartelt is a Senior Vice President with over 40 years of experience in environmental engineering and project management, including 25 with ARCADIS. He is considered an expert on the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Superfund program, and is experienced in all aspects of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)-related response activities and Resource Conservation and Recovery Act (RCRA) corrective actions. As a practicing environmental engineer since 1973, Mr. Bartelt has personal experience with the evolution of the environmental protection industry in the United States and has provided court testimony dating to the late 1950's. Mr. Bartelt has extensive experience in the review of compliance histories for uncontrolled and regulated sites and has testified regarding the responses of regulated parties to both permit requirements and enforcement demands. As a consultant with ARCADIS, Mr. Bartelt has provided strategic and expert witness support for some of the largest and most complex hazardous materials sites including mining sites including the Coeur d' Alene River Basin in Idaho; Leadville in Colorado; Tar Creek in Oklahoma and Libby, Montana; and traditional hazardous waste sites such as Manistique River and Harbor in Michigan; Hardage Criner Landfill in Oklahoma; and Oakdale Dump in Minnesota. He has directed and participated in site inspections, removal actions, hazard ranking system (HRS) scoring, National Priorities List (NPL) submittals and rebuttals, the preparation of remedial investigations and feasibility studies (RI/FS), RCRA facility investigations (RFI) and corrective measures studies (CMS). He has also participated in alternatives evaluation and selection, preparation of plans and specifications, and the management of site cleanup activities. Mr. Bartelt has directed and conducted RCRA compliance reviews, closure plan preparations, corrective action plan preparation and has assisted clients in negotiations with U.S. Environmental Protection Agency (US EPA) and state agencies regarding corrective action requirements and site cleanup activities. In addition, Mr. Bartelt has provided primary technical and programmatic direction for the NCP compliant real property divestiture program developed by the United States Coast Guard Civil Engineering Unit in Cleveland which has addressed sites in numerous states and at least 4 USEPA regions. Mr. Bartelt has also provided technical and strategic support to private party voluntary cleanups under state programs and brownfields remediation and redevelopment.

In the area of regulatory negotiations, Mr. Bartelt has an extensive record of successfully representing individual clients and Potentially Responsible Party (PRP) groups. His accomplishments as a lead technical negotiator or written commentator include the removal of candidate sites proposed for inclusion on the NPL. Mr. Bartelt has worked cooperatively with USEPA to develop scopes of work for large removal action projects. These projects typically involved the development of an Engineering Evaluation and Cost Analysis (EE/CA), resulting in expedited cost-effective removal actions. As a result of Mr. Bartelt's input on remedial action projects, ARCADIS clients have benefited from Records of Decision (RODs) which selected PRP proposed alternatives over those initially selected in USEPA's proposed plan. Through his input ARCADIS' clients have been able to work with USEPA to secure ROD amendments and modifications through Explanations of Significant Differences (ESDs). He has also successfully negotiated cost-effective scopes of work for Remedial Design/ Remedial Action (RD/RA) activities at NPL sites. Mr. Bartelt has directed the development and presentation of successful requests for technical impracticability waivers for both federal and state remediation sites. In addition, Mr. Bartelt has negotiated on behalf of clients seeking variation from ROD remedies approved by USEPA and assisted in structuring acceptable modified responses. As a result of these negotiations, clients have consistently realized the benefits of Mr. Bartelt's program experience and negotiating skills, technical experience and knowledge of State and Federal regulations, policies and procedures. Since entering private practice, Mr. Bartelt has been involved over 100 separate NPL sites as a project manager, strategist/negotiator, senior advisor, and/or expert witness. During that time he has worked on projects in over 40 states and in all 10 USEPA regions.

As an expert witness and strategic consultant regarding CERCLA issues, Mr. Bartelt has successfully represented both plaintiffs and defendants in cost-recovery litigation. Based on an emergency removal response designed by ARCADIS under Mr. Bartelt's supervision, USEPA retracted a unilateral 106 order in favor of a consent order for surface and underwater drum removal at an NPL site. At another site where USEPA sought emergency removal action, Mr. Bartelt provided technical and programmatic input that resulted in further investigation of contaminated sediments and lead to the completion of an engineering evaluation /cost analysis (EE/CA). This project resulted in a non-time-critical removal action as opposed to the immediate removal initially sought by USEPA. As an expert witness, Mr. Bartelt has developed approaches to evaluating and documenting the nature of response costs incurred and their consistency with the NCP. Summaries allow for analysis and sorting based on the circumstances and timing of response actions. Similarly, Mr. Bartelt has reviewed and critically evaluated costs claimed which were not adequately documented or were not consistent with the NCP.

Mr. Bartelt has testified in court on numerous occasions and has testified before Congressional and State legislative committees.

On behalf of PRP clients, Mr. Bartelt has assisted in developing appropriate scopes of work for evaluating the potential for damage to natural resources. He has also successfully presented arguments that available data can eliminate the need for natural resource damage related data collection.

Prior to joining ARCADIS, Mr. Bartelt directed the USEPA Region 5 Superfund Program for seven years and the Groundwater Protection Program for three years. In these capacities he was recognized as an expert in Superfund program implementation and groundwater contamination evaluation. He has testified on behalf of USEPA in court proceedings and before Congress. In 1986 Mr. Bartelt participated on the Administrator's Superfund reauthorization task force as one of only two regional representatives. While at USEPA, he supervised over 100 engineers, scientists and support personnel, at the time the largest Regional Superfund program in the country. In the capacity of Region 5 Superfund Coordinator, Mr. Bartelt was a substantial contributor to and primary reviewer of the 1982 and 1985 versions of the CERCLA NCP. As the Region 5 Superfund Coordinator, he served as Co-Chairman of the Regional Emergency Response Team, managed the region's emergency and oil spill response programs, and the Community Right-to-Know program.

While on temporary assignment to USEPA Headquarters, Mr. Bartelt served as chairman of USEPA's RCRA enforcement policy task force, which included headquarters, regional and state regulators. The purpose of this task force was to prioritize USEPA and state enforcement activities and to establish generic compliance schedules for response to RCRA enforcement actions. High priority violations were defined and categorized by the task force, as was a scheme for states to address significant violators within specified time frames.

As USEPA Region 5 Superfund Coordinator, Mr. Bartelt directed the development of mechanisms for screening RCRA facilities from the 5,000 potential Superfund sites in the region and developed an internal training and review system to ensure that remedial responses under Superfund were consistent with relevant and appropriate RCRA requirements for closure and/or corrective actions. Between 1976 and 1980 Mr. Bartelt provided the leadership for the development of the region's groundwater protection program. In that role Mr. Bartelt was responsible for the Underground Injection Control Program, a permitting program to regulate the injection of fluids below the ground surface. He also served on the agency's first two groundwater strategy task forces and the work group which designed and managed the implementation of the Surface Impoundments Assessment. Mr. Bartelt worked in the municipal wastewater treatment program, specializing in construction grant and project management and construction inspection. While focusing on municipal

wastewater collection and treatment facilities, Mr. Bartelt was a primary contributor to the development of the Region 5 infiltration and inflow evaluation and elimination program.

From 1970 to 1972, Mr. Bartelt served two years in the US Army with a combat engineering Military Occupational Specialty and during that period managed in excess of $10 million worth of defense contracting for site development work at the Newport Army Ammunition Plant in Newport, Indiana. For this work he received the Army Commendation Medal.

Project Experience

Removal Action Strategy, Former Superfund Site
Torch Lake, Michigan
Project Engineer for removal action at a Michigan NPL site. As a result of the strategy developed, the scope of the removal action reduced the number of drums to be removed from a lake bottom from over 660 to approximately 120. Reduction was based on sonar and underwater evaluations identifying those drums which warranted removal. In response to publishing of USEPA's proposed plan for remedial action at this NPL site, ARCADIS submitted comments including an alternate risk assessment resulting in minimal shoreline restoration as opposed to the massive dredging, excavation and disposal originally proposed by the Agency. Site conditions were related to mining and process waste contamination of surface soils and area sediments. This site has been deleted from the NPL.

Removal Action Strategy, Contaminated Sediment Site
Manistique Harbor, Michigan
Project Regulatory Strategist for a voluntary SACM non-time critical removal action at a Lake Michigan contaminated harbor sediment site. As a result of site characterization and risk assessment as documented in an approved EE/CA completed by the PRP group client, an in-place containment remedy was formally selected by USEPA as the removal response. USEPA had initially proposed to dredge harbor sediments, but PRP comments and public opposition resulted in selection of an in lake capping remedy. The PRPs ultimately settled with USEPA based on the cost of the containment remedy and were allowed to cash out, allowing USEPA to pursue a more expensive dredging remedy using trust fund moneys after releasing settling PRPs from cost recovery liability. Savings to the client were in excess of $35 million.

Regulatory Negotiation for Superfund Landfill Site
Kalamazoo, Michigan
Project Officer for an NPL Landfill remediation. ARCADIS developed comments for a PRP group client for submittal during the mandatory public comment period relative to a USEPA conducted RI/FS and proposed plan. The remedy selected in the USEPA Record of

Decision was that proposed by ARCADIS on behalf of the PRPs in lieu of the remedy offered in the Agency's Proposed Plan.

Regulatory Negotiation for NPL Removal, Industrial Waste Disposal Facility
Green Bay, Wisconsin
Principal reviewer and commentator relative to the proposed listing of an NPL candidate site. Information provided by ARCADIS resulted in re-evaluation of HRS score for an industrial landfill and removal of the site as a candidate for the NPL.

Senior Review and Support, Former ECI Refinery
AtlanticRichfield , East Chicago , Indiana
Atlantic Richfield has been working with East Chicago Waterway Management District (the present owner) and the Indiana Department of Environmental Management since 1991 to manage this former refinery site until a final remedy can be selected. Interim actions have included the installation of numerous product recovery/containment systems to recover free product from groundwater; maintenance of approximately 2,300 feet of oil sorbent booms across the Lake George Branch of the Indiana Harbor Shipping Canal that intersects the site to contain and remove petroleum found on the Canal's surface; removal of petroleum found in surface soils on site; site investigation and sampling work; and development of proposed final remedy options. Mr. Bartelt has provided project officer review and senior project advisor support for this project since 1990.

Project/ Program Management Experience

- Strategic Consulting, Farm Equipment Manufacturing Facility, John Deere, Ottumwa, Iowa - Project Officer responsible for development and implementation of work plan for RI/FS for an active Iowa manufacturing facility on the Des Moines River. The RI completed by ARCADIS for the client documented the site conditions which included metals contamination in site soils and concluded the site did not pose a threat to public health or the environment. A monitoring only (No Action) remedy was selected.
- Strategic Consulting, Confidential Client - Project Officer for NCP compliant investigation of Illinois manufactured gas plant site as part of a site redevelopment program. Investigation allowed development of a research park incorporating waste isolation prior to the existence of either state or federal brownfield initiatives.
- Hi Mill Manufacturing Facility,Highland , Michigan - Project Officer for review of U.S. EPA proposed remediation plan for a Michigan NPL site. Comments were prepared by ARCADIS and submitted on behalf of the client and persuaded the

agency to select a cost effective containment remedy which, in turn, allowed the private client to remain in business to operate the containment systems rather than declare bankruptcy in the face of an untenable capital outlay.

- Mining Site Torch Lake, Michigan - Project Engineer for removal action at a Michigan NPL site. As a result of the strategy developed, the scope of the removal action reduced the number of drums to be removed from a lake bottom from over 660 to approximately 120. Reduction was based on sonar and underwater evaluations identifying those drums which warranted removal. In response to publishing of U.S. EPA's proposed plan for remedial action at this NPL site, ARCADIS submitted comments including an alternate risk assessment resulting in minimal shoreline restoration as opposed to the massive dredging, excavation and disposal originally proposed by the Agency. Site conditions were related to mining and process waste contamination of surface soils and area sediments. This site has been deleted from the NPL.
- Contaminated Sediment Site, Manistique Michigan - Project Regulatory Strategist for a voluntary SACM non-time critical removal action at a Lake Michigan contaminated harbor sediment site. As a result of site characterization and risk assessment documented in an approved EE/CA completed by the PRP group client, an in-place containment remedy was formally selected by U.S. EPA as the removal response. U.S. EPA had initially proposed to dredge harbor sediments, but PRP comments and public opposition resulted in selection of an in lake capping remedy. The PRPs ultimately settled with U.S. EPA based on the cost of the containment remedy and were allowed to cash out, allowing U.S. EPA to pursue a more expensive dredging remedy using trust fund moneys after releasing settling PRPs from cost recovery liability. Savings to the client were in excess of $50 million.
- Navistar Brownfields Sites, Chicago, Illinois - Project Officer on two large industrial site closures under the State of Illinois and City of Chicago brownfields initiatives. Both sites were large (over 20 acres and over 170 acres) industrial sites, one manufacturing the other steel milling. Commercial industrial future use was established and site characterization is in progress to establish clean-up levels and approaches.
- Project Officer and Engineer for remediation of a large historical oil release alleged to be threatening the Mississippi River. This U.S. EPA directed removal action at an Illinois site incorporated a passive oil recovery system voluntarily developed with the approval of the U.S. EPA on-scene-coordinator.
- Project Manager for a peer review of closure plans for two abandoned Montana wood treatment facilities. The review established cost effectiveness and NCP compliance goals for closure activities of the railroad industry client. One of the

sites was an NPL site. Subsequently provided expert testimony in litigation to collect insurance coverage. Testimony addressed the compliance posture of each facility with federal and State regulatory demands.

- Project Officer for an NPL Landfill remediation where ARCADIS developed comments for a PRP group client for submittal during the mandatory public comment period relative to a U.S. EPA conducted RI/FS and proposed plan. The remedy selected in the U.S. EPA Record of Decision was the remedy proposed by ARCADIS on behalf of the PRPs in lieu of the remedy offered in the Agency's Proposed Plan.
- Principal reviewer and commentator relative to the proposed listing of NPL candidate site, resulting in removal of the site from NPL based on information provided by ARCADIS.
- Project Officer for RD/RA at two contiguous NPL sites owned and operated by separate PRPs. Identified by PRPs as designated U.S. EPA contact for project management and coordination of PRP activities. Site characterization resulted in a ROD modification selecting a more cost-effective remedial approach.
- Project Manager on RCRA Closure of a 15-acre industrial lagoon at a spent nuclear fuel storage facility.
- Principal engineering advisor at two Department of Energy facilities developing strategies and work plans for closure and corrective actions for multiple RCRA facilities and solid waste management units.
- Served in 1985 as chairman of U.S. EPA's RCRA enforcement policy task force.
- One of two regional representatives to serve on the U.S. EPA Administrator's Task Force charged with framing EPA's positions on the reauthorization of CERCLA in 1985.
- As part of the remedy selection process and incorporating comments received from the public, including PRPs, directed the development of U.S. EPA's first fund-balanced Record of Decision specifying on-site containment of PCB wastes at the Waukegan Harbor, Illinois Superfund site.
- As Region 5 Superfund Program Manager, provided regional input and comments regarding the 1982 and 1985 versions of the NCP. Also served on the task forces drafting initial portions of both documents prior to release for comment by the regions.
- Served as the senior regional technical member of U.S. EPA's Surface Impoundment Assessment work group, which received the Agency's bronze medal.

- Served on various Region 5 work groups and task forces responsible for developing and prioritizing thousands of sites for response and/or NPL listing. Prioritization typically included development of potential response cost estimates.

Senior Review and Regulatory Strategies

Congressional/Expert Witness Testimony On Behalf of USEPA

- Judicial Review of PBB Contaminated Cattle Burial Site, Mio, Michigan. Testified as representative of U.S. EPA in regard to the technical viability of clay-lined containment for contaminated cattle disposal facility as it related to protection of groundwater. Disposal of 500 contaminated cattle carcasses was proposed and implemented based on the judicial review.
- Judicial Review of Court Directed Activities, Berlin and Ferro, Swartz Creek, Michigan. Testified on behalf of U.S. EPA regarding inconsistency with NCP of court-directed safety precautions, technical approach, schedule expectations, and budget for remediation of the drum disposal site. As a result of the proceedings, the court deferred to U.S. EPA for project management.
- House Subcommittee for Review of PRP Settlement on Surface Cleanup at Seymour Recycling Corporation, Seymour, Indiana. Testified on behalf of U.S. EPA regarding the technical justification for and the cost of the proposed surface cleanup at the Seymour site. As a result of these proceedings, further investigation of the technical solution was not pursued by the subcommittee.

Representative Expert Witness Testimony

Expert Witness Testimony, Superfund Site
PRP Group, Coeur d'Alene, Idaho
Provided expert court testimony on behalf of defendant PRPs regarding necessity and reasonableness of response costs incurred by the United States investigating contamination, primarily lead contamination associated with the Bunker Hill Superfund site in Idaho. Case is pending.

Expert Cost Summaries, Lead-Impacted Sites
ASARCO, Leadville, Colorado
For plaintiff PRPs, developed concise summaries of costs incurred investigating and remediating lead contamination resulting from mining and smelting activity in Leadville, Colorado. Response actions occurred over a 20 year period and totaled in excess of $100 million, based on hundreds of tasks both area-wide and site-specific in nature. Case settled

avoiding litigation based on agreement on cost summary developed. Summary was prepared to permit sorting based on NCP compliant response activity, site, vendor and cost.

Expert Witness Testimony on the Appropriateness of Response Actions, Lead-Impacted Sites
Various Defendants, Tar Creek / Picher , Oklahoma
For defendants in a toxic tort lawsuit, developed concise summary and provided deposition testimony regarding response actions conducted by the parties and USEPA in response mining and smelting activity in Picher, Oklahoma. Response actions occurred over an extensive period, and included both source control and individual property remediation and restoration both area-wide and site-specific in nature. Case settled avoiding litigation. Mr. Bartelt's testimony characterized response actions as NCP compliant response activity that was consistent with USEPA guidance and policy.

- Testimony regarding NCP compliance in defense of JFD Electronics in litigation filed by Channel Master in one of the first private party cost recovery cases filed under CERCLA. Case dismissed favoring JFD by Summary Judgment based on plaintiff's failure to comply with the NCP.
- Provided expert testimony regarding USEPA's failure to respond in a manner not inconsistent with the NCP on behalf of defendant Rayonier in litigation with the United Stated regarding cost recovery for site investigation costs associated with HRS scoring of the Rayonier Mill site in Port Angeles, Washington. Court ruled substantially in favor of the defendant, awarding the U.S. only 25% of the costs sought. The site entailed discharges to soils, groundwater, surface water and alleged contamination of sediments near the Port Angeles, WA wood pulp mill.
- Provided expert testimony and cost summary relative to site investigation and response costs for smelter-related soil contamination. Plaintiffs' sites were located in Columbus, Ohio and Hillsboro, Illinois. Case settled without litigation based on cost summaries.
- Provided expert court testimony on behalf of railroad industry plaintiff regarding necessity of response costs and consistency with the NCP. Costs were associated with investigation and remediation of soils on a Chicago, IL area high school athletic field contaminated with arsenic. The court ruled in favor of the plaintiff. Provided testimony in a private party cost recovery matter in Illinois resulting in a bench decision that ARCADIS' client was entitled to recovery of response costs related to releases from wood treatment facilities at a lumber yard in the Chicago area.
- Provided expert testimony in a Minnesota class action suit regarding diminution of property value. Testimony was based on a historical file review of permit and

enforcement requirements and addressed the responsiveness of the defendant to expectations for regulatory compliance and responsible corporate citizenship. Testimony included an overview of applicable and relevant statutory and regulatory requirements from the 1950's through 2009.

- Testimony regarding NCP compliance for plaintiffs in the Hardage Criner Superfund litigation. Defendants settled with plaintiffs agreeing to cost sharing.
- Provided expert testimony on behalf of defendants in a class action suit relative to lead contamination exposure at an Oklahoma Superfund site in Picher, Oklahoma. Testimony addressed the appropriateness and responsible nature of actions by defendant PRPs. Case was settled.
- Provided expert testimony on behalf of defendant relative to response costs incurred by the United States regarding soil and groundwater contamination, including heavy metals, resulting from defendant drum reconditioning activities at a Florida site. Case was settled through mediation.

Attachment 2

Documents Considered by Richard Bartelt

Title	Author	Date
Second Amended Complaint and Jury Demand		8/2/2011
EPA Index-EPA Inmagic Index No SDMS_1993-2011	USEPA	
EPA Index-EPA Inmagic with SDMS numbers_1993-2011	USEPA	
EPA Index-EPA SDMS INDEX_1993-2011	USEPA	
EPA Index-EPA-Index 1855-1992	USEPA	
Anaconda Smelter Superfund Site-Annual Site Update 2005	USEPA	Feb-06
Anaconda Smelter Superfund Site-Annual Site Update 2008	USEPA	Feb-07
Anaconda Smelter Superfund Site-Dust Fact Sheet	USEPA	Dec-06
Anaconda Smelter Superfund Site-Focus on Opportunity Ponds	USEPA	Sep-07
Anaconda Smelter Superfund Site-Superfund Annual Update 2007	USEPA	Feb-08
Anaconda Smelter Superfund Site-Superfund Annual Update 2010	USEPA	Feb-10
Anaconda Smelter Superfund Site-Superfund Annual Update 2011	USEPA	Mar-11
Anaconda Smelter Superfund Site-Site Overview January 2000	USEPA	Jan-00
CSOU Final Proposed Plan	USEPA	Sep-12
Figure 1-1. Site Location Map	Montana Department of Environmental Quality and EPA	
Figure 3-1. Revised Ground Water Area of Concern	Montana Department of Environmental Quaiity and EPA	
Figure 3-1. Site Location Map	Montana Department of Environmental Quaiity and EPA	
Figure 3-2. Revised Surface Water Area of Concern	Montana Department of Environmental Quality and EPA	
Figure 3-3. Waste Management Areas	Montana Department of Environmental Quality and EPA	

Figure 4-1. Opportunity Ponds Subarea Significant Changes	Montana Department of Environmental Quality and EPA	
Groundwater Arsenic Contaminant Plumes and Potential Sources near Opportunity, Montana	USEPA	Sep-05
Record of Decision System (RODS) Anaconda Co. Smelter Abstract	USEPA	
Region 8 Superfund Program Anaconda Co. Smelter	USEPA	Sep-12
Remedial Design/Remedial Action ARWW&S Operable Unit, Anaconda, Montana	ARCO	
Smoke Wars Anaconda Copper, Montana Air Poilution and the Courts 1890-1920	Donald MacMilian	2000
Figures that accompany the CSOU and ARWW&S RODs	USEPA	
VIII 84-08 Anaconda Smelter (with amendments)		10/22/1984
Viii 85-09 Anaconda Smelter Flue Dust (with amendments)		12/20/1985
VIII 86-06 Anaconda Smelter Mill Creek Road Dust		6/9/1986
VIII 86-07 Anaconda Smelter Mill Creek		7/1/1986
VIII 87-04 Anaconda Smelter flue Dust Pilot (with amendments)		7/29/1987
Viii 88-16 Anaconda Smelter (with amendments)		1/20/1988
Civil No. 88-32 Anaconda Smelter Mill Creek 9-14-88		9/28/1988
VIII 88-06 Anaconda Smelter Old Works Community Soils (with amendments)		9/28/1988
VIII 91-26 Anaconda Smelter Community Soils		9/20/1991
VIII 92-11 Anaconda Smelter Old Works		4/2/1992
ARWWS Arbiter and Beryllium 92-12		7/8/1992
Flue Dust CD 92-76		9/31/1992
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Interview with Joel Chavez, Montana Department of Environmental Quality		4/2/2013

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

IN THE MATTER OF: ATLANTIC RICHFIELD COMPANY, a Delaware Corporation, Respondent. PROCEEDING UNDER SECTIONS 104(b), 122(a), AND 122(d)(3) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, 42 U.S.C. § 9601, et seq., AS AMENDED BY THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, PUB. L. 99-499, 100 STAT. 1613 (1986)	)	ADMINISTRATIVE ORDER ON CONSENT Anaconda Smelter Site Remedial Investigation/ Feasibility Study Docket No. CERCLA VIII-88-16

ADMINISTRATIVE ORDER ON CONSENT

I

JURISDICTION

1. This Administrative Order on Consent (the "Consent Order") is issued pursuant to the authority vested in the President of the United States by sections 104(b), 122(a), and 122(d)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 ("CERCLA"). This authority was delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on January 23, 1987, by Executive Order

No. 12,500, 52 Fed. Reg. 2923, and further delegated to the Regional Administrators by EPA Delegation No. 14-14-C on February 26, 1987.

2. In accordance with sections 104(c)(2), 104(d)(1) (for State Management Assistance Role), and 121(f) of CERCLA and the National Contingency Plan, 40 C.F.R. Part 300, the State of Montana (hereinafter referred to as the "State") is signing this Consent Order in a consultative capacity.

3. The Respondent agrees to undertake all actions required by the terms and conditions of this Consent Order. The Respondent consents to the jurisdiction of EPA and the State (EPA as a party to this Consent Order and the State under applicable Federal or State law) in any proceeding to enforce this Consent Order. In any such proceeding, the Respondent will not contest, for the purposes of establishing jurisdiction, any Findings of Fact deemed necessary by the Court to establish jurisdiction to enforce this Consent Order. The activities taken pursuant to this Consent Order, if conducted consistent with this Consent Order, shall be deemed not inconsistent with the National Contingency Plan ("NCP"), 40 C.F.R. Part 300, Federal Register Vol. 50, No. 4, at 4791 (November 20, 1985).

II.

SCOPE OF RESPONDENT'S RESPONSIBILITY

No change in ownership or corporate or partnership status shall in any way alter the status of responsibility of the

Respondent under this Consent Order. The Respondent shall be responsible for carrying out all actions required of the Respondent by the terms and conditions of this Consent Order. The Respondent shall be responsible for ensuring that all contractors, consultants, firms, and other persons or entities acting on its behalf, with respect to matters included herein, will comply with the terms of this Consent Order.

III.

NOTICE OF ACTION

EPA has notified the State of this action pursuant to the requirements of section 121(f) of CERCLA.

IV.

STATEMENT OF PURPOSE

1. In entering into this Consent Order, the Respondent, the State, and EPA agree that the Respondent will conduct Remedial Investigations ("RI's") and Feasibility Studies ("FS's") for the purpose of: a) evaluating the nature and extent of contamination and impacts on the public health or welfare or the environment due to the release of hazardous substances, pollutants, and contaminants at the Anaconda Smelter site and b) identifying and evaluating remedial alternatives for preventing or mitigating the release of hazardous substances, pollutants, or contaminants at the Anaconda Smelter site.

2. On the effective date of this Consent Order pursuant to section IX.T. of this Consent Order, Administrative Order on Consent Docket No. CERCLA VIII-84-08, which was issued on October 22, 1984, pursuant to section 106 of CERCLA, 42 U.S.C. § 9606, will terminate by mutual agreement of EPA and the Respondent. That 1984 Consent Order also required that the Respondent conduct Remedial Investigations and Feasibility Studies ("RI/FS's") for several areas on the Anaconda Smelter site. EPA has determined that the 1984 Consent Order should be terminated and replaced by this Consent Order for the following reasons:

a. The 1984 Consent Order did not reflect the new requirements of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499.

b. The 1984 Consent Order did not reflect the new requirements of the November 20, 1985, revised National Contingency Plan ("NCP"), 50 Fed. Reg. 47912.

c. EPA's priorities for investigation of the site have changed since the 1984 Consent Order and accompanying RI/FS Work Plan were issued. The current priorities place greater emphasis on those operable units which pose the greatest risk to humans and the environment through actual or potential contact with smelter wastes or contaminated soils, air, or water. EPA

establishes criteria in this Consent Order's General Work Plan for setting priorities for addressing both human health and environmental issues.

3. The activities conducted pursuant to this Consent Order are subject to approval by EPA, in consultation with the State. In conducting all such activities, whether directly or through the retention and direction of contractors, Respondent shall ensure the employment of sound scientific, engineering, and construction practices and shall be consistent with CERCLA, as amended; the NCP, 40 C.F.R. Part 300, as amended; and EPA RI/FS guidance, all as in effect as of the beginning of work in implementing each operable unit-specific Work Plan.

V.

DEFINITIONS

1. The term "days" shall mean calendar days, unless business days are specified. Any deliverables, notices, or other written documents that under the terms of this Consent Order would be due on a Saturday, Sunday, State of Montana, or Federal holiday shall be due on the following business day.

2. The terms "the Fund" or "Superfund" shall refer to the Hazardous Substance Superfund established in section 221 of CERCLA, 42 U.S.C. § 9631.

3. The term "the Parties" refers to the Respondent and the United States Environmental Protection Agency ("EPA"), through the EPA Region VIII office.

4. The term "Respondent" shall mean the Atlantic Richfield Company ("ARCO"), a Delaware Corporation, through the Anaconda Minerals Company ("AMC"), a unit of ARCO Coal Company, a division of ARCO. The term "Respondent" shall also mean ARCO's officers, directors, principals, employees, agents, successors, and assigns.

VI.

FINDINGS OF FACT

EPA, with the concurrence of the State, has made the following Findings of Fact concerning the Anaconda Smelter site:

1. The Anaconda Smelter NPL site is located in Deer Lodge County in southwestern Montana, at geographic coordinates N 46°07.7' W 112°53.9'. The site was listed on the NPL on September 8, 1983, 48 Fed. Reg. 40658. The Anaconda Smelter site includes but is not limited to the actual site of the Anaconda Copper Smelter and associated real property and buildings including the beryllium waste disposal vault and the Flue Dust Storage Facility (this area is commonly called the "Smelter Hill"), the "Old Works," the Anaconda Tailings Ponds, the Opportunity Tailings Ponds including the B-2 Pond beryllium disposal site, the Slag Pile, the Arbiter Works, and soils in the

area surrounding the Smelter contaminated by past airborne emissions.

2. Much of the Anaconda Smelter site as described above is currently owned by the Respondent. The Respondent is the Atlantic Richfield Company, a Delaware corporation. The Respondent and/or its predecessors in interest have owned and operated the smelting, concentrating, and waste storage and disposal facilities at the site since approximately 1884.

3. Since the Respondent's predecessors in interest began operating the Anaconda Copper Smelter in the "Smelter Hill" area in approximately 1902 until cessation of operations at the Smelter in 1980, the Respondent and its predecessors produced large quantities of a variety of waste products during copper smelting and associated operations. Quantities of these various solid wastes, including but not limited to flue dust, slag, scrubber sludge, and tailings, were stored or disposed of and are still located in and around the Anaconda Smelter site. These solid wastes contain varying elevated levels of arsenic, lead, copper, zinc, cadmium, and other hazardous substances. Smelter stack particulate emissions contained arsenic, lead, cadmium, copper, zinc, and other heavy metal elements. Large areas of soils in the area surrounding the smelter were contaminated by the airborne stack emissions of arsenic, lead, cadmium, copper, and zinc. Beryllium wastes are present on the site. The Respondent's predecessors in interest's operations at the Old Works produced large quantities of tailings contaminated with

arsenic, lead, cadmium, copper, and zinc that were discharged into Warm Springs Creek and carried down Warm Springs Creek to the Clark Fork River, resulting in contaminated floodplain deposits and contaminated deposits in the Milltown Reservoir. Other hazardous substances such as vanadium pentoxide, polychlorinated biphenols, and asbestos may also be located on the Anaconda Smelter site.

4. Arsenic is a human carcinogen and cadmium is a probable human carcinogen. Arsenic and cadmium can be acutely and chronically poisonous and can be fatal if ingested or inhaled in sufficient quantities by humans, livestock, and wildlife. Arsenic and cadmium compounds are absorbed into the body primarily through inhalation or ingestion. Lead is a cumulative poison which can cause neurologic, kidney, and blood cell damage in humans. Some lead compounds are also animal carcinogens adversely affecting the lungs and kidneys. Some beryllium, copper, and zinc compounds are toxic at elevated levels to a number of animal species, including humans. Copper and zinc are particularly toxic to fish. Severe illness and/or death can result from excessive exposure of humans, livestock, and wildlife to toxic levels of arsenic, cadmium, lead, copper, zinc, or beryllium.

5. The solid waste materials present at the Anaconda Smelter site described in paragraph VI.3. and the associated arsenic, lead, cadmium, copper, and zinc are continuing to be emitted, leaked, leached, or discharged into the environment,

including waters of the United States and waters of the State of Montana.

6. Actual and potential routes of migration or exposure to arsenic, cadmium, lead, copper, zinc, beryllium, and other hazardous substances, pollutants, or contaminants which may be present at the Anaconda Smelter site include but are not limited to direct human or animal contact with wastes, soil, and sediment containing hazardous substances, pollutants, or contaminants; wind-transport of soil particles containing hazardous substances, pollutants, or contaminants; migration of the hazardous substances, pollutants, or contaminants to groundwater; and migration of the hazardous substances, pollutants, or contaminants to surface water. Elevated levels of varying degrees of hazardous substances, pollutants, or contaminants have occurred in the following four environmental media as a result of discharging, leaking, leaching, or emitting of hazardous substances, pollutants, or contaminants at specific places on and around the Anaconda Smelter site: soils (sediments), air, groundwater, and surface water. Hazardous substances, pollutants, and contaminants have not been necessarily discharged, leaked, leached, or emitted into all of the four media from each operable unit at the site, but most operable units have involved such releases into at least one media.

VII.

CONCLUSIONS OF LAW

Based on the preceding Findings of Fact, EPA, with the concurrence of the State, has made the following Conclusions of Law:

1. The Respondent falls within the definition of "person" as set forth in section 101(21) of CERCLA, as amended, 42 U.S.C. § 9601(21).

2. The mining, milling, and smelting waste piles and impoundments and contaminated soils at the Anaconda Smelter site are individually and collectively a "facility" as defined in section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

3. The Respondent is or was an "owner or operator" of the facilities at the Anaconda Smelter site as defined in section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

4. Arsenic, lead, cadmium, zinc, beryllium, and copper are "hazardous substances" as defined by section 101(14)(D) of CERCLA, as amended, 42 U.S.C. § 9601(14)(D).

5. EPA, with the concurrence of the State, has determined that the presence at, and the past, present, and potential future migration of the "hazardous substances, pollutants, and contaminants" set forth in paragraph VI.6. above, at and from the Anaconda Smelter site constitute an actual and/or threatened "release" as defined in section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

6. For purposes of this Consent Order, the Respondent is a "responsible party" within the meaning of section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

VIII.

DETERMINATIONS

Based on the Findings of Fact and Conclusions of Law set forth above, EPA, after consultation with the State, has determined that:

1. The actions required by this Consent Order are necessary to protect the public health and welfare and the environment, are in the public interest, and are consistent with CERCLA, as amended, and the NCP, 40 C.F.R. Part 300, as amended.

2. The Respondent is qualified to properly and promptly perform the actions set forth in this Consent Order.

IX.

ORDER

A. Respondent's Conduct of RI/FS's

1. Based on the foregoing facts and pursuant to the authority of sections 104(b), 122(a), and 122(d)(3) of CERCLA, 42 U.S.C. §§ 9604(b), 9622(a), and 9622(d)(3), the Respondent is ordered and agrees to conduct RI/FS's for the Anaconda Smelter site pursuant to the terms of this Consent Order. The Respondent shall conduct the RI/FS's in accordance with CERCLA as amended; the NCP, 40 C.F.R. Part 300, as amended; and EPA RI/FS guidance,

all as in effect as of the beginning of work in implementing each operable unit-specific Work Plan. The Respondent shall also conduct the RI/FS's in accordance with the attached General Work Plan, Flue Dust Work Plan, and the Smelter Hill Work Plan, as well as additional operable unit-specific work plans that are agreed to by EPA and the Respondent. The attached General Work Plan, Flue Dust Work Plan, and Smelter Hill Work Plan are hereby incorporated into this Consent Order as enforceable parts thereof. Additional operable unit-specific work plans that are agreed to by EPA, in consultation with the State, and the Respondent shall be incorporated into this Consent Order by reference as an enforceable part thereof upon amendment of the Consent Order. Draft RI reports and data collected to support those reports submitted to EPA by the Respondent pursuant to Administrative Order on Consent Docket No. CERCLA VIII-84-08 have been and shall be fully utilized as appropriate in designing operable unit-specific work plans and conducting further RI/FS work. In the event of any inconsistency between the terms and conditions of this Consent Order and those contained in the work plans and associated schedules, attachments, and exhibits, or other documents incorporated herein, the terms and conditions of this Consent Order shall take precedence.

2. The attached General Work Plan (Attachment 1) identifies the complete list of operable units (40 C.F.R. § 300.68(c)) for the Anaconda Smelter site, a priority ranking for addressing those operable units, and the basis for that

priority ranking. EPA expressly reserves the right to amend the General Work Plan, after consultation with the State, in accordance with the procedures in paragraph IX.T.2., as necessary. The Respondent shall conduct RI/FS's covering all of the operable units listed in the General Work Plan in accordance with specific activities and schedules for conducting RI/FS work for individual operable units set forth in the Operable Unit-Specific Work Plans developed in accordance with subparagraph IX.A.3. The Flue Dust and Smelter Hill Operable Unit-Specific Work Plans, including schedules, have been developed and are attached as enforceable parts of this Consent Order (Attachments 2 and 3).

3. On a periodic basis, EPA, in consultation with the State and the Respondent, shall develop operable unit-specific work plans for other operable units listed in the General Work Plan or combinations thereof or identified by EPA as necessary, after consultation with the State. Subject to the reservation of rights in paragraph IX.M.1., EPA shall submit the additional operable unit-specific work plan(s) to the Respondent and request in writing that the Respondent conduct the RI/FS's for the operable unit(s). No later than sixty (60) calendar days prior to submission of the work plan to the Respondent, EPA shall provide the opportunity with reasonable notice for a scoping meeting with the Respondent and the State to discuss the form and substance of the work plan with the Respondent. The Respondent shall provide comments to EPA and the State within forty-five

(45) calendar days of receipt of the operable unit-specific work plan from EPA. If EPA, in consultation with the State, and the Respondent agree on the work plan, the work plan shall be incorporated into this Consent Order as an enforceable part hereof through an amendment under paragraph IX.T.2. of this Consent Order. If EPA, in consultation with the State, and the Respondent cannot agree on the work plan, EPA, in consultation with the State, shall respond in writing to the Respondent's comments. If EPA, in consultation with the State, and the Respondent cannot agree on a work plan within thirty (30) calendar days of Respondent's receipt of EPA response, EPA reserves the right to conduct the RI/FS for the relevant operable unit(s) and/or pursue any other actions authorized by CERCLA. In such case, the State also reserves the right to conduct the RI/FS for the relevant operable unit and pursue any remedies authorized under applicable Federal and State law. (This shall not be construed to imply that the Anaconda Smelter site will be converted by EPA from a Federal CERCLA enforcement lead to a State CERCLA enforcement lead site.) If EPA, after consultation with the State, rejects the Respondent's proposal to perform the operable unit-specific work plans, EPA shall provide the Respondent with a written statement of the basis and reasons for the rejection prior to the initiation of an RI/FS by EPA or the State for that operable unit.

4. If additional investigations at a particular operable unit beyond those provided for in the Operable Unit-Specific Work

Plan for that particular operable unit are determined by EPA, after consultation with the State, to be necessary, EPA, in consultation with the State and the Respondent, shall develop a Supplemental Scope of Work for that specific operable unit describing the additional work. EPA, after consultation with the State, shall submit the Supplemental Scope of Work to the Respondent and request in writing that the Respondent perform the additional work and specify the basis and reasons for EPA's determination that additional work is necessary. No later than thirty (30) calendar days prior to submittal of the Supplemental Scope of Work to the Respondent, EPA shall provide the opportunity with reasonable notice for a scoping meeting with the Respondent and the State to discuss the form and substance of the Supplemental Scope of Work. The Respondent shall respond in writing to EPA's request for additional work and provide any comments it has on the Supplemental Scope of Work to EPA and the State within thirty (30) calendar days of receipt of the Supplemental Scope of Work from EPA. If EPA, in consultation with the State, and the Respondent agree on the Supplemental Scope of Work and EPA, in consultation with the State, approves the Supplemental Scope of Work, the Supplemental Scope of Work shall be incorporated into this Consent Order as an enforceable part through an amendment under paragraph IX.T.2 of this Order. If EPA, in consultation with the State, and the Respondent cannot agree on the Supplemental Scope of Work, EPA, in consultation with the State, shall respond in writing to the Respondent's

comments. If EPA, in consultation with the State, and the Respondent cannot agree on a work plan within thirty (30) calendar days of Respondent's receipt of EPA's response, EPA reserves the right to conduct the RI/FS activities described in the Supplemental Scope of Work and/or pursue any other actions authorized by CERCLA. In such case, the State also reserves the right to conduct the RI/FS activities described in the Supplemental Scope of Work and pursue any remedies authorized under applicable Federal and State law. (This shall not be construed to imply that the Anaconda Smelter site will be converted by EPA from a Federal CERCLA enforcement lead to a State CERCLA enforcement lead site.) If EPA rejects the Respondent's proposal to perform the Supplemental Scope of Work, EPA shall provide the Respondent with a written statement of the basis and reasons for the rejection prior to the initiation of the supplemental RI/FS work by EPA or the State.

5. In the event that subsequent amendments to the NCP are promulgated after the effective date of this Consent Order which materially affect the rights or obligations of either party with respect to the substantive nature of the work to be performed in the RI/FS's, EPA, in consultation with the State, and the Respondent agree to negotiate in good faith an amendment to this Consent Order to provide for such changes.

6. EPA shall prepare, and the State shall participate in the preparation of, all necessary draft and final endangerment assessments, public health evaluations, and analyses of

"applicable or relevant and appropriate" Federal and State standards, requirements, criteria, and limitations ("ARAR's") required for the RI/FS work and provide them to the Respondent in a timely manner for incorporation into the draft and final RI/FS reports as described below. The Respondent may submit a preliminary scoping document addressing endangerment assessment, public health evaluation, or ARAR's issues to EPA and the State no later than one hundred twenty (120) calendar days before EPA's projected date for delivery of draft or final endangerment assessments, public health evaluations, or ARAR's analyses to the Respondent, except that the Respondent may submit a preliminary scoping document addressing the flue dust operable unit draft endangerment assessments, public health evaluations, or ARAR's issues/analyses no later than sixty (60) calendar days before EPA's projected date for delivery of these documents. The Respondent agrees that its work in preparing the scoping document(s) does not duplicate EPA's and the State's work in preparing endangerment assessments, public health evaluations, and ARAR's analyses. The Respondent agrees that no formal EPA or State response to the Respondent's documents is needed before draft EPA documents are published for public comment. EPA shall use its best efforts to complete and deliver these reports to the Respondent within the time periods projected for completion and delivery in the RI/FS work plans. These projected time periods are estimates and are not binding upon EPA. EPA shall notify the Respondent as early as possible if EPA intends to complete and

deliver the reports before the dates projected in the work plan. EPA, in consultation with the State, shall include applicable or relevant and appropriate State requirements in the ARAR's analysis in order to ensure that remedial alternatives will be evaluated for compliance with them. EPA and the State shall attempt to resolve any disagreements regarding State requirements before forwarding the ARAR's analysis to the Respondent. EPA reserves its right to select appropriate ARAR's at the time of remedy selection. Respondent shall not utilize the deliverables required by paragraph IX.A.7. of this Consent Order to object to or to contradict endangerment assessments, public health evaluations, and ARAR's analyses prepared by EPA; instead, the Respondent shall provide any comments on such documents separately but not later than the public comment period described in paragraph IX.A.7. below. The Respondent, EPA, and the State shall strive to present complete comments and responses, respectively, on endangerment assessment, public health evaluation, and ARAR issues. After each issue is addressed by EPA, in consultation with the State, and the Respondent, to the extent practicable, the comment/response package shall be included in the administrative record for subsequent operable units without changes or additions. However, if additional information, changes in Federal or State requirements, or other new factors develop which change the context in which the comments and responses were made, new or additional comments and responses may be submitted.

7. a. Preliminary Draft RI/FS Report

The Respondent shall submit preliminary draft RI/FS reports to EPA for review and approval and the State for review and comment as provided in the Work Plan schedules. Upon receipt of a preliminary draft RI/FS report by EPA and the State, EPA, after consultation with the State, shall prepare and transmit comments to the Respondent concerning any necessary revisions to be made in the final draft report before it is made available for public comment. The State shall transmit its comments to EPA for consideration for incorporation into EPA's comments and direction to the Respondent. The State shall also transmit a copy of any comments that it may have to the Respondent. The Respondent shall respond to State comments it receives directly from the State by sending a written response to the State independent of the RI/FS activities. The Respondent shall not revise the RI/FS in response to State comments unless directed to do so by EPA, after consultation with the State.

b. Final Draft RI/FS Reports

The Respondent shall revise preliminary draft RI/FS reports to address EPA's comments and submit final draft RI/FS reports to EPA for review and approval and the State for review and comment within forty-five (45) calendar days of receipt of EPA's comments on preliminary draft RI/FS reports. If EPA, after consultation with the State, disapproves final draft RI/FS reports, EPA, after consultation with the State, shall notify the Respondent in writing of the disapproval and the basis for the disapproval.

The dispute resolution procedures of paragraph IX.J. shall apply to disputes arising from EPA's disapproval. In EPA's disapproval notification and in EPA's final determination at the conclusion of dispute resolution procedures, EPA shall specify whether EPA or the Respondent shall make the necessary revisions in final draft RI/FS reports. If EPA determines that the Respondent shall revise final draft RI/FS reports, the Respondent shall revise the final draft RI/FS reports and submit them to EPA as soon as possible but no later than thirty (30) calendar days after receipt of the notice of disapproval or EPA's determination at the conclusion of dispute resolution procedures. EPA or the State may complete final draft RI/FS reports and recover the costs pursuant to Federal or State law if EPA, in consultation with the State, determines that EPA or the State, rather than the Respondent, shall complete the final draft RI/FS report. In such a case, EPA and the State may pursue any other remedies authorized under applicable State and/or Federal law. Upon submittal to EPA and the State and EPA approval, after consultation with the State, of final draft RI/FS reports, EPA shall make them available to the public for review and comment for, at a minimum, a twenty-one (21) day period.

c. Draft Final RI/FS Reports

Following the public review and comment period, the Respondent shall submit draft final RI/FS reports to EPA and the State within thirty (30) calendar days of receipt of EPA's directions for revision and completion for the State's review and

comment and EPA's review, comment, and approval. The Respondent shall adequately address EPA's comments and directions in the draft final RI/FS reports. The State shall transmit its comments for preparation of the draft final RI/FS reports to EPA for consideration for incorporation into EPA's comments and direction to the Respondent for the draft final RI/FS reports. The State shall also transmit a copy of any comments that it may have to the Respondent. The Respondent shall respond to comments it receives directly from the State by sending a written response to the State independent of the RI/FS activities. The Respondent shall not revise RI/FS reports in response to State comments unless directed to do so by EPA, after consultation with the State.

d. Final RI/FS Reports

The Respondent shall have thirty (30) calendar days after receipt of EPA's comments on draft final RI/FS reports for submittal of final RI/FS reports to EPA for review and approval and the State for review and comment. If the Respondent does not adequately respond to EPA's comments in its revisions in final RI/FS reports, EPA may notify the Respondent in writing that EPA disapproves the final RI/FS reports and will complete the RI/FS and the costs will be recovered pursuant to section 107, 42 U.S.C. § 9607. In such a case, EPA and the State may complete the RI/FS and pursue any remedies authorized under applicable Federal and/or State law. (This shall not be construed to imply that the Anaconda Smelter site will be converted by EPA from a

Federal CERCLA enforcement lead to a State CERCLA enforcement lead site.) The dispute resolution procedures in paragraph IX.J., with the exception of the 14 calendar day informal dispute resolution procedures in subparagraph IX.J.1, shall apply to disputes arising from EPA's disapproval of final RI/FS reports based upon the failure of the Respondent to adequately respond to EPA's comments in final RI/FS reports and a resultant EPA decision, after consultation with the State, to complete the RI/FS. The Respondent shall deliver to EPA all records pertaining to the conduct of the RI/FS, except as exempt by law from such disclosure, within ten (10) calendar days of receipt of such notification from EPA.

e. Deadline Extensions Based on Late EPA Deliverables

In the event that comments or other key documents produced by EPA described in the attached Work Plan are submitted by EPA to the Respondent later than indicated or estimated in the Work Plan and this shortens the period allowed for the Respondent to comply with a deadline, the relevant specific compliance deadlines for the Respondent shall be extended by one working day for each working day that EPA's comments or documents are late.

B. Reporting and Exchange of Documents

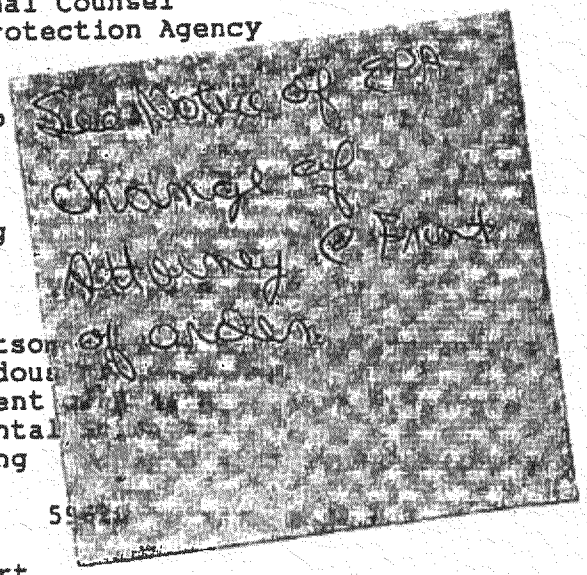
1. One copy of all plans, reports, notices, and other work products related to a particular operable unit that are required under the terms of this Consent Order shall be sent by Respondent, certified mail, return receipt requested, to the following addresses:

a. Designated EPA Project Coordinator for
Anaconda Smelter Site
Operable Unit (add name of operable unit)
EPA Montana Operations Office
Federal Building
301 South Park
Helena, Montana 59626-0096

Designated EPA Attorney
(Name of Operable Unit)
Office of Regional Counsel
Environmental Protection Agency
Denver Place
999 18th Street,
Denver, Colorado

or

Federal Building
301 South Park
Helena, Montana



b. Mr. Duane Robertson
Solid and Hazardou
Montana Department
and Environmental
Cogswell Building
Room B201
Helena, Montana 59

Mr. Thomas Eggert
Legal Division
Montana State Department of Health
and Environmental Sciences
Cogswell Building
Helena, Montana 59620

2. Respondent, the State, EPA, and their respective contractors and consultants shall cooperate and upon receipt make available to each other in a timely manner, the results of sampling and testing, and other data generated by any of them or on their behalf, including raw data and field notes, and any other relevant information in their possession regarding the actions called for by this Consent Order, except as exempt by law from such disclosure.

C. Site Access and Sampling

1. The Respondent shall permit EPA, the State, and their authorized representatives to have access to its property at reasonable times or at any time during the performance of any work required by this Consent Order to monitor any activity conducted pursuant to this Consent Order, to inspect and copy records pertaining to the Work Plans or removal work which are required to be made available pursuant to section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and to conduct sampling and other data gathering.

2. The Respondent hereby consents to observation by EPA representatives and representatives of the State at any reasonable times, or at any time during the performance of work required under this Consent Order. The Respondent consents to EPA or the State taking samples or split samples at any time at EPA's or the State's discretion. The Respondent shall ensure that a sufficient quantity of materials to be sampled are available whenever possible in order to allow EPA and the State to take a split sample on the day of sampling. The Respondent shall use its best efforts to notify EPA and the State not less than seven (7) calendar days in advance of any sample collection activity to be conducted by the Respondent or its representatives.

3. To the extent access to property owned by third parties is required in order for the Respondent to carry out the requirements of this Order, the Respondent shall use its best

efforts to obtain such access, beginning no later than thirty (30) calendar days before access is required to conduct activities in accordance with schedules set forth in work plans and sampling and analysis plans incorporated into this Consent Order. The Respondent shall notify EPA and the State no later than thirty (30) calendar days after initiating efforts to obtain access if access is not obtained during the thirty (30) day period before access is required. Failure to obtain access after the use of best efforts by the Respondent shall be treated as a force majeure condition as set forth in paragraph IX.I. The Respondent shall notify EPA and the State, and EPA shall use its best efforts to obtain access for the Respondent if the Respondent provides documentation to EPA demonstrating that it has used its best efforts to obtain access on its own and failed to obtain access. When working on property owned by third parties, the Respondent shall provide the opportunity for the third party to request and obtain a split sample. The Respondent shall submit written evidence to EPA and the State documenting that such an opportunity was provided in the appropriate data report. The Respondent agrees that it will reimburse EPA for EPA's expenses not inconsistent with the NCP and this Consent Order in gaining access for the Respondent at the request of the Respondent, and will indemnify EPA as provided in paragraph IX.O. of this Consent Order. The Respondent shall have the burden of proving that EPA's expenses were inconsistent with the NCP and this Consent Order.

4. EPA or the State shall notify the Respondent, orally or in writing, not less than seven (7) calendar days in advance of any sample collection activity by or on behalf of EPA or the State. Upon the request of the Respondent, EPA or the State shall provide split or duplicate samples to the Respondent of any samples collected by or on behalf of EPA or the State at or in the vicinity of the property which is the subject of the Work Plans, provided that a sufficient quantity of the materials to be sampled are available on the day of sampling. The procedures for collecting such split or duplicative samples will be the procedures set forth in the approved Quality Assurance Project Plan for the Anaconda Smelter NPL site.

D. Quality Assurance/Quality Control

1. The Respondent shall comply with the quality assurance, quality control, and chain of custody procedures and requirements as they pertain to all sampling as set forth in the Quality Assurance Project Plan ("QAPP") and Laboratory Analytical Protocol ("LAP") established and approved by EPA in 1988 for the Anaconda Smelter Site Remedial Investigation/Feasibility Study required pursuant to the CERCLA section 106 Administrative Order on Consent, Docket No. CERCLA-VIII-84-08, which are incorporated herein by reference into this Consent Order and comply with the procedures and requirements of any such documents submitted and approved or amended pursuant to this Consent Order. The Respondent shall submit to the State for review and comment and to EPA for review and approval Sampling Analysis Plans ("SAP's")

which document standard operating procedures, sampling locations, and descriptions of how the proposed sampling will meet the objectives of the planned investigation(s). To the extent that the LAP and QAPP for the Anaconda Smelter NPL site do not address media and/or hazardous substances, pollutants, or contaminants proposed for sampling and analysis in work plans or scopes of work (e.g., vanadium pentoxide, polychlorinated biphenols, or asbestos), the Respondent shall provide quality assurance/quality control and analytical procedures in the SAP(s) for State review and comment and EPA review and approval. These proposed procedures shall be in the form of an appendix to the SAP which may be added to the LAP and/or QAPP as an amendment. The Respondent shall comply with all applicable SAP requirements.

2. In order to provide quality assurance and maintain quality control with respect to all samples collected pursuant to this Consent Order, the Respondent shall:

a. Arrange for access for EPA, the State, and their authorized representatives, upon reasonable notice to Respondent and during regular business hours, to any laboratories and personnel utilized by the Respondent for analyses;

b. Ensure that all sampling and analyses are performed according to the methods set forth in the approved QAPP, LAP, Field Operations Plans ("FOP's"), and Sampling and Analysis Plans ("SAP's"), and that any laboratories utilized by

the Respondent for analyses prepare and maintain adequate documentation of its compliance with these requirements and that such documentation be made available to EPA, the State, and the Respondent upon request.

c. Ensure that any laboratories utilized by the Respondent for analyses participate in a quality assurance/quality control program equivalent to that which is followed by EPA, and which is consistent with EPA guidance and subsequent amendments. As part of such a program, and upon request by EPA, such laboratories shall perform analyses of samples provided by EPA to demonstrate the quality of each laboratory's analytical data.

d. If the Respondent utilizes a laboratory which participates in EPA's Contract Laboratory Program, paragraphs IX.D.2.a. and c. of this section shall be inapplicable.

E. Record Preservation

The Respondent agrees that it shall preserve and make available to EPA and the State, during the pendency of this Consent Order and for a period of six (6) years from the date of termination of this Consent Order, all nonprivileged records or documents in its possession or in the possession of its employees, agents, accountants, contractors, or attorneys that relate to the Work performed at the site pursuant to this Consent

Order. At the end of this six (6) year period, and upon written request of EPA or the State, the Respondent may destroy any such records, but only after notifying EPA and the State at least thirty (30) calendar days in advance and allowing EPA or the State to inspect and copy any such records.

F. Designation of Project Coordinator

1. On or before the effective date of this Consent Order, EPA, the State, and the Respondent shall each designate a Project Coordinator and an Alternate Project Coordinator, as well as a lead attorney for the overall order, the Flue Dust Work Plan, and the Smelter Hill Work Plan. As subsequent operable unit-specific work plans are amended into the Consent Order, Project Coordinators, Alternate Project Coordinators, and lead attorneys shall also be designated for those operable units. The Project Coordinator shall be responsible for overseeing the implementation of this Consent Order. To the maximum extent possible, communications among the Respondent, the State, and EPA, and all documents, reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Consent Order, shall be directed through the Project Coordinators. If the Project Coordinators are unavailable, such information shall be directed through the Alternate Project Coordinators. During implementation of the Work Plans, the Project Coordinators shall, whenever possible, attempt in good faith to resolve disputes informally through discussion of the issues.

2. EPA, the State, and the Respondent shall each have the right to change their respective Project Coordinators. Such a change shall be accomplished by notifying the other party in writing at least ten (10) calendar days prior to the change.

3. The EPA-designated Project Coordinator shall have the authority vested in the On-Scene Coordinator under the NCP. This authority includes, but is not limited to, the power to initiate action not inconsistent with the NCP, to terminate actions inconsistent with the NCP, and to complete response activities required by this Consent Order which are not inconsistent with the NCP.

4. The absence of the EPA Project Coordinator from the site shall not be cause for stoppage of the Work to be performed pursuant to this Consent Order.

G. Authenticity and Accuracy of Data

1. Except as provided herein, EPA, the State, and the Respondent, in any proceeding to enforce this Consent Order or any other enforcement action taken by EPA or the State, stipulate to authenticity and accuracy and hereby waive any evidentiary or other objection as to the authenticity and accuracy or reference in endangerment assessments, public health evaluations, feasibility studies, or remedial design of any final data generated or evaluated by EPA, the State, or the Respondent in the oversight or performance of the requirements of this Consent Order or CERCLA Administrative Order on Consent Docket No. CERCLA VIII-84-08. For purposes of this section, the term "final data

generated, or evaluated" shall be interpreted to mean only analytical data that has been verified and approved by EPA, after consultation with the State, as being in full compliance with the quality assurance/quality control ("QA/QC") requirements of the QAPP, LAP, and SAP's in effect at the time the samples were collected after an evaluation conducted pursuant to the QA/QC data validation procedures required by this Consent Order and the RI/FS work plans.

2. For purposes of this section, stipulations and waivers of objections pertaining to "authenticity" include, without limitation, waivers of objections and stipulations pertaining to collection and sampling procedures, chemical or physical analyses, chain of custody, field and laboratory QA/QC procedures, and objection based on the failure to offer any sponsoring witnesses, including samplers, chemists, and their assistants, and other persons in the chain of custody.

3. For purposes of this section, the word "accuracy" means that the data reliably represents concentrations of hazardous substances, pollutants, and contaminants in the medium sampled at the time and point of sampling.

4. If EPA, in consultation with the State, determines that analytical data is still usable in the RI/FS (and supporting documents) for certain specified purposes in those situations where EPA, in consultation with the State, also determines that the quality assurance/quality control requirements in the QAPP, LAP, and SAP's in effect at the time the samples were collected

were not fully met for samples collected under CERCLA Administrative Order on Consent Docket No. CERCLA VIII-84-08 and this Consent Order or that such requirements were not met for samples collected under non-CERCLA programs, EPA may identify such data in a written report, along with a description of the acceptable uses for the data, including any limitations on such uses and the reasons why it is still usable and transmit the report to the Respondent with a request that the Respondent stipulate to the authenticity and accuracy of the data and waive any evidentiary objection to the data in any enforcement proceeding by the State or EPA. The Respondent shall respond in detail in writing no later than thirty (30) calendar days following receipt of the report to each issue and data point discussed by EPA. The Respondent shall negotiate in good faith and, if agreement is reached, enter into a written stipulation and waiver. If EPA, after consultation with the State, and the Respondent do not agree to a written stipulation covering certain data, the Respondent waives its rights to object to any effort on the part of EPA or the State to collect or require the collection of new data to replace that which was not stipulated to. The Respondent may also submit a report to EPA and the State identifying data that does not fully comply with QA/QC requirements, describing acceptable uses for the data, describing the reasons why it is still usable, and proposing a written stipulation and waiver of the right to raise evidentiary

objections in any future enforcement proceeding by the State or EPA.

H. Delays in Performance/Stipulated Penalties

1. For any delay by the Respondent in completing a task called for in the Work Plans, or if the Respondent otherwise fails to achieve the requirements of this Consent Order specified below, the Respondent shall pay the sums set forth below as stipulated penalties for each calendar day during which it fails to timely comply with the requirements of this Consent Order, except as provided in section IX.I. immediately following this section:

a. Compliance Deadlines for Delivery of Sampling and Analytical Plans, IASD Phase II FS Reports, Preliminary Site Summary Reports, Preliminary Draft RI/FS Reports, Final Draft RI/FS Reports, Draft Final RI/FS Reports, and Final RI/FS Reports Set Forth in RI/FS Work Plans Incorporated Into This Consent Order

Delay (calendar days after compliance deadline	Amount/Day
1-14 days	$3,000
15-30 days	$6,000
31 or more days	$12,000

b. For Failure to Pay Uncontested Portion of Reimbursable Costs on Time as Specified in Subparagraph IX.L.1.b.

Delay (calendar days after compliance deadline	Amount/Day
1-14 days	$1,000
15-30 days	$3,000
31 or more days	$6,000

c. For Each Instance of Destruction of Records in Violation of Paragraph IX.E., , Failure to Provide Access Under Paragraph IX.C.1., or Failure to Comply With the Agreement Not to Contest Jurisdiction in Subparagraph IX.M.6.

$20,000 per instance.

EPA may, in its discretion, impose a lesser penalty for minor violations. Any reduction in the stipulated penalty imposed shall be solely at EPA's discretion and shall not be subject to dispute resolution. Stipulated penalties shall begin to accrue as of the date of the violation of the Consent Order requirement.

2. The check for payment of the stipulated penalties shall be mailed within 14 calendar days following the end of the calendar week during which they accrue. Payment must be made by certified or cashier's checks, addressed to:

U.S. Environmental Protection Agency
Superfund Accounting
P.O. Box 371003M
Pittsburgh, Pennsylvania 15251
Attn: Collection Officer for Superfund Accounting

A copy of the transmittal letter and copy of the check shall be sent to:

Office of Regional Counsel
U.S. Environmental Protection Agency
999 18th Street, Suite 500
Denver, Colorado 80202-2405
Attn: Rex Callaway, Attorney

3. The stipulated penalties set forth in subparagraph 1 of this paragraph IX.H. shall not preclude EPA or the State from electing to pursue any other remedy or sanction which may be available to EPA or the State because of the Respondent's violation or failure or refusal to comply with any of the terms

of this Consent Order, including a suit to enforce the terms of this Consent Order. Said stipulated penalties shall not preclude EPA from seeking statutory penalties of not more than $25,000 for each day pursuant to 42 U.S.C. section 9609, or liability for punitive damages in any amount up to three times the amount of any costs incurred by the Hazardous Substances Superfund established by sections 221-223 of CERCLA, 42 U.S.C. §§ 9631-9633. 42 U.S.C. § 9607(c)(3). In addition, the payment of stipulated penalties shall not preclude the State from seeking statutory penalties pursuant to Federal or State law.

4. Delay caused by formal dispute resolution requested by the Respondent in which the United States prevails shall not constitute a circumstance beyond the control of the Respondent for purposes of being excused from payment of stipulated penalties under paragraph IX.I. If EPA prevails, stipulated penalties shall be due for each day from the date of noncompliance to the decision resolving or terminating the dispute resolution proceeding, except as provided in paragraph IX.J.2.; however, if EPA prevails, the Regional Administrator, in his sole discretion, may excuse or reduce stipulated penalties which accrued during the dispute resolution period based upon a finding by the Regional Administrator, to be included in the written decision pursuant to Paragraph IX.J.2., that Respondent, acting in good faith, submitted a material issue for resolution.

I. Force Majeure

Failure of the Respondent to comply with the requirements of this Consent Order shall be excused to the extent such delays or failures of performance are caused by occurrence(s) beyond the control of the Respondent and which by the exercise of due diligence the Respondent is unable to prevent (herein called "Force Majeure"), including but not limited to: Acts of God, war, revolution, riots, strikes, fires, floods, or hurricanes. Such circumstances shall not include increased cost of performance, changed economic circumstances, or normal precipitation events. Although they do not technically constitute Force Majeure events, failure to obtain access to property of third parties pursuant to paragraph IX.C.3. and failure to obtain any necessary governmental permits and approvals other than approvals by EPA of deliverables and activities conducted under this Consent Order (provided that the Respondent has exercised due diligence in attempting to obtain such permits and approvals), which prohibits or delays performance shall be treated in the same manner as Force Majeure events pursuant to this Consent Order. The Respondent shall bear the burden of proving that any failure to comply with the requirements of this Consent Order is due to Force Majeure. The Respondent shall promptly notify EPA's and the State's Project Coordinators orally, and shall, within seven (7) days of oral notification to EPA and the State, notify EPA and the State in writing of the anticipated length and cause of delay, the

measures taken and to be taken to prevent or minimize the delay, and the timetable by which the Respondent intends to implement those measures. Written notification shall be sent by certified mail, return receipt requested, to Director, Hazardous Waste Management Division, EPA Region VIII, 999 18th Street, Suite 500, Denver, Colorado 80202-2405 and to Mr. Duane Robertson of the State at the address noted earlier. Oral notifications to EPA and State representatives must occur in no event more than 48 hours after the Respondent becomes aware of the occurrence or event causing the delay or failure in whole or in part. Failure to notify EPA and the State of any event for which Force Majeure is claimed shall waive the defense otherwise provided by this paragraph, but only for the event for which notice is not made.

If the Respondent demonstrates to EPA that the delay has been or will be caused by circumstances beyond the reasonable control of the Respondent and that it exercised due diligence to prevent the delay, the time for performance for that element of a Work Plan shall be extended by EPA, after consultation with the State, for a period equal to the delay resulting from such circumstances, such delay to include any reasonable additional time necessary, not to exceed 15 days, to mobilize manpower or machinery after the elimination of the Force Majeure event. This shall be accomplished through written notice or through an amendment to this Consent Order, as appropriate. Such an extension does not alter the schedule for performance or completion of other tasks required by a Work Plan unless these

are specifically altered by amendment of the Consent Order, or unless the work on those other tasks depends on continued work on the tasks delayed by the Force Majeure event. In the event further work depends on the work delayed by the Force Majeure event, the time for performance of the further work shall be extended only for a period equal to that of the delay caused by the Force Majeure and any reasonable additional time necessary, not to exceed 15 calendar days, to mobilize manpower and machinery. In the event that EPA, after consultation with the State, and the Respondent cannot agree that any delay or failure has been or will be caused by circumstances beyond the reasonable control of the Respondent, or if there is no agreement on the length of the extension, the dispute shall be resolved in accordance with the provisions of paragraph IX.J. of the Order. If Respondent does not prevail in the dispute resolution pursuant to the dispute resolution process, stipulated penalties shall accrue during the term of the dispute resolution procedures, as provided for in paragraph IX.J. If the Respondent prevails in the dispute, no stipulated penalties shall apply.

J. Dispute Resolution

1. Except as provided in paragraph IX.A.7. of this Consent Order, in the event of any dispute pertaining to any requirements or tasks required by this Order, EPA, in consultation with the State, and the Respondent shall enter into an informal dispute resolution period not to exceed fourteen (14) calendar days. EPA, in consultation with the State, and the Respondent shall

make a good faith attempt to resolve the dispute during this period. Within this 14-calendar-day period, EPA agrees to schedule at least one meeting with the Respondent's Project Coordinator to discuss the dispute; and if EPA does not offer to meet during that period, the accrual of stipulated penalties shall be stayed pending EPA's scheduling of a meeting. Any agreement resolving any dispute shall be in writing, signed and dated by EPA and the Respondent, and shall be incorporated into this Consent Order by reference. If the dispute cannot be resolved during this period, the Respondent shall submit the dispute in writing to the Regional Administrator, EPA Region VIII, with a copy sent to the Director, Hazardous Waste Management Division, EPA Region VIII (the "Director") and a copy sent to Mr. Duane Robertson of the State of Montana at the address noted earlier. The Regional Administrator's decision shall be final. EPA and the Respondent must submit their positions in writing to the Regional Administrator within this 14-day period. All comments by EPA and the Respondent to the Regional Administrator and/or the Director related to the dispute and/or any other matter related to this action shall be submitted to EPA and the State in writing.

2. The Regional Administrator, or in his absence, the Director of the Hazardous Waste Management Division, after consultation with the State, shall render a written decision as expeditiously as possible. If the Regional Administrator or the Director of the Hazardous Waste Management Division cannot render

a decision within 15 days of his receipt of the submission, the accrual of stipulated penalties shall be stayed at that point pending receipt of his decision.

3. There shall be no pre-enforcement review of the Work Plan or any part of this Order.

4. The Respondent may not challenge provisions of this Consent Order to which it has already agreed by resorting to these dispute resolution procedures. Implementation of these dispute resolution procedures shall not provide a basis for delay of any schedule for activities required in this Consent Order unless EPA, after consultation with the State, agrees in writing to a schedule extension.

5. The Regional Administrator, after consultation with the State, shall have authority to suspend these dispute resolution procedures during any period in which immediate action is required to prevent an emergency.

K. Other Claims

1. Nothing herein is intended to release any claims, causes of action, or demands in law or equity against any person, firm, partnership, or corporation not a signatory to this Consent Order for any liability that such person, firm, partnership, or corporation may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, disposal, or release of any pollutant, contaminant, or hazardous substance at, to, or from the Anaconda Smelter site. Nothing contained in this Consent Order shall affect any right, claim,

interest, or cause of action of any party hereto with respect to third parties.

2. The Respondent waives all claims or demands for compensation or payment under sections 111 and 112 of CERCLA against the United States or the Hazardous Substances Superfund established by section 221 of CERCLA arising out of any activity performed or expenses incurred pursuant to this Consent Order.

3. This Consent Order does not constitute any decision on preauthorization of funds under section 111(a)(2) of CERCLA.

4. EPA and the State recognize that the Respondent may have the right to seek contribution, indemnity, or any other available remedy against any person found to be responsible or liable for contribution, indemnity, or otherwise for any amounts which have been or will be expended by the Respondent in connection with the site. EPA and the State are under no obligation to assist the Respondent in any contribution, indemnification, or other suit concerning the subject matter of this Consent Order.

5. Any claim of the Respondent against any other responsible party shall be subordinate to the rights of the United States and the State in accordance with 42 U.S.C. section 9613(f)(3)(C).

6. With the exception of claims for costs reimbursed by the Respondent to the State pursuant to section IX.L.2., the Respondent waives any claim or defense, and is estopped from asserting, that the role which the State assumes under this

Consent Order constitutes any element of or the defense of estoppel in an action by the State asserting any and all common law and Federal and State statutory claims that have arisen or may arise against the Respondent, including any and all claims relating to the Anaconda Smelter site, for any and all available legal and equitable relief. If any such claim is brought by the State, the administrative record established pursuant to paragraph IX.R. shall be available as provided in paragraph IX.R. to the State and the Respondent during the pendency of the claim.

7. By executing this Consent Order in a consultative capacity, the State represents its intention to participate in such a consultative role in the RI/FS's for the Anaconda Smelter site. Unless either a specific situation may present an imminent and substantial endangerment to human health or the environment, or the State reasonably determines that State action is necessary to prevent or abate long-term injury to or loss of a natural resource under the State's trusteeship, the State agrees to utilize the opportunities provided in this Consent Order to comment to EPA and the Respondent prior to the initiation of any independent State civil action (other than an action to recover State response costs, natural resource damages, or civil penalties) against the Respondent alleging Federal, State, or common law claims relating to the activities undertaken by Respondent in connection with the Consent Order. The State also agrees to consult with EPA to the maximum extent practicable

prior to the initiation of any such independent State civil action.

L. Reimbursement of Costs

1. EPA

a. The Respondent agrees to reimburse the Fund for any costs incurred by the United States under, or in connection with, any prospective government oversight expenses related to this Consent Order, including, but not limited to, the costs incurred by EPA in having a qualified person oversee the conduct of this RI/FS pursuant to section 104(a) of CERCLA. The Respondent retains the right to pursue claims against persons other than EPA and its officers, employees, authorized representatives, contractors, and consultants for contribution or indemnity for these costs.

b. On an annual basis beginning one (1) calendar year from the effective date of this Consent Order, EPA shall submit an accounting, including all necessary and applicable documentation, to the Respondent of all oversight costs incurred by EPA with respect to this Consent Order not inconsistent with the NCP and this Consent Order during the previous one (1) year period (beginning with the effective date of this Consent Order). The Respondent shall have the burden of proving

that EPA's expenses were inconsistent with the NCP and this Consent Order. The documentation provided by EPA shall include the name and title of Federal employees, date(s), time, charges, and EPA contractor vouchers and/or invoices for work performed for EPA oversight activities concerning implementation of this Consent Order. Within sixty (60) calendar days of receipt of each such tabulation, the Respondent shall remit a check to EPA for the full amount of its costs, if they are undisputed, or the amount not subject to dispute resolution proceeding pursuant to paragraph IX.L.1.d. below.

c. Payment to EPA for oversight costs incurred by EPA shall be made to the order of the Hazardous Substances Superfund by cashier's or certified check and forwarded to the U.S. EPA, Superfund Accounting, P.O. Box 371003M, Pittsburgh, Pennsylvania 15251, Attn: Superfund Collection Office. Payments should be identified as "Reimbursement Costs--Anaconda Smelter Site (Montana)." Copies of all payments to EPA shall be provided at the time of such payments to the EPA Project Coordinator and to EPA Region VIII, Attention: Mr. Rex Callaway, Office of Regional

Counsel, 999 18th Street, Suite 500, Denver, Colorado 80202-2405.

d. If the Respondent concludes that EPA has made an accounting error or has included costs that are inconsistent with the NCP or this Consent Order or costs that are unrecoverable under section 107 of CERCLA, it may contest payment of all or a portion of the costs set forth in the accounting by notifying EPA of these conclusions in writing within 30 days of the receipt of the accounting. EPA and the Respondent shall follow the dispute resolution procedures in paragraph IX.J. to resolve their differences. If agreement cannot be reached under the dispute resolution procedures, EPA reserves all rights it has to bring an action against Respondent to enforce this Consent Order or to bring an action pursuant to section 107 of CERCLA, 42 U.S.C. § 9607, to recoup all recoverable costs as set forth in the accounting, not reimbursed by the Respondent. EPA also reserves the rights it has to recover any other past and future costs recoverable under section 107 of CERCLA, 42 U.S.C. § 9607, incurred by the United States in connection with response activities conducted pursuant to CERCLA in connection with the facility.

e. EPA oversight expenses shall be considered to include time or expenses paid for from the Fund and incurred by the State in assisting EPA in oversight of this Consent Order pursuant to management assistance cooperative agreements.

2. State of Montana

a. The Respondent agrees to reimburse the State for all response costs incurred by the State that were not paid with Federal or Fund monies at or in connection with the Anaconda Smelter site prior to this Consent Order, which sum includes costs incurred under, arising from, or in connection with this Consent Order prior to the date of execution of this Consent Order, in an amount not to exceed $225,000.00. Payment of this sum by Respondent is in full satisfaction and reimbursement for all response costs unique or directly allocable to the Anaconda Smelter site incurred by the State prior to the execution of this Consent Order. Within 60 days of such execution, the State shall submit an accounting to the Respondent for response costs covered by this subparagraph a. The accounting shall include the documentation described in subparagraph c of this paragraph IX.L.2., and Respondent's review of such documentation and payment to the State shall be

according to the procedures set forth in that subparagraph c.

b. Respondent agrees to reimburse the State for oversight costs incurred by the State in connection with this Consent Order as defined below. On or after the beginning of each calendar quarter (i.e., before January 1, April 1, July 1, and October 1), beginning one month after the effective date of this Consent Order, the State shall submit an accounting to the Respondent, with the documentation described in subparagraph c below, covering oversight costs incurred by the State in the previous quarter in connection with its participation, in its consultative role, in this Consent Order.

For purposes of this subparagraph b only, "oversight costs incurred by the State" shall include: (1) costs associated with consulting with EPA in situations in which this Consent Order provides for such consultation; (2) costs of State employees and costs for retained legal counsel and its attorneys and employees in reviewing and commenting upon deliverables submitted by Respondent (reimbursement for such review and comment extends to the State's assessment and assertion of issues relating to Federal or State

laws or regulations concerning the substance or scope of the RI/FS other than issues relating to natural resource damages assessment); (3) sampling and analytical costs relating to samples and split samples taken by the State pursuant to this Consent Order; and (4) other necessary and reasonable indirect costs (not including costs other than those used in the yearly calculation of the State indirect rate) incurred by the State in connection with its consultative role pursuant to this Consent Order.

c. The documentation described in subparagraphs a and b of this paragraph IX.L.2. provided by the State shall include the names and titles of State employees and retained legal counsel and its attorneys and employees and a description of date(s), time, and other direct charges for work relating to State oversight activities concerning this Consent Order. Within thirty (30) days of receipt of documentation from the State, the Respondent shall, subject to its right to invoke the provisions in subparagraph f of this paragraph IX.L.2., reimburse the State for all such costs.

d. The Respondent retains the right to pursue claims against other persons for contribution or

indemnity for costs paid to the State pursuant to subparagraphs a and b of this paragraph IX.L.2.

e. Payment to the State for its response costs described in subparagraphs a and be shall be by check, made payable to "State of Montana, Department of Health and Environmental Sciences" and shall be tendered to: Centralized Services Division, Montana Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Room C123, Helena, Montana 59620. Payments should be identified as "Response Costs--Anaconda Smelter Site." Copies of all payments to the State shall be provided at the time of such payment to: Thomas Eggert, Esq., Legal Division, Montana Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Room C126, Helena, Montana 59620.

f. If the Respondent concludes that the State has made an accounting error or has included response costs that are not authorized by subparagraphs a and b, it may contest payment by notifying the State of these conclusions in writing within thirty (30) days of receipt of the accounting, and any objection to the State's response costs not made within that time is waived. The State and the Respondent shall then have thirty (30) days to

resolve their differences. If agreement cannot be reached within the 30-day period, the State reserves all rights it has to bring an action against Respondent pursuant to applicable Federal and State law to recoup all recoverable costs as set forth in the accounting, not reimbursed by the Respondent. If the Respondent contests payment of any of the State's response costs included within an accounting submitted pursuant to subparagraph b of this paragraph IX.L.2. and such costs are subsequently found to be due and owing the State pursuant to section 75-10-715(1), MCA, the Respondent shall be liable to the State for punitive damages in an amount of two (2) times the enforcement and litigation costs, including attorneys' and expert witness fees and expenses, incurred by the State in collecting such contested amount.

g. The State reserves all rights it has to recover any other costs incurred subsequent to the effective date of this Consent Order and recoverable under applicable Federal or State law, in connection with response activities conducted pursuant to CERCLA or applicable State statutory or common law in connection with the facility.

3. EPA and the State agree not to each independently retain contractors, subcontractors, or consultants using CERCLA Fund monies to oversee the same activities of the Respondent conducted pursuant to this Consent Order, resulting in duplication of effort.

M. Reservation of Rights

1. EPA and the State retain the right to conduct other investigations and activities at the Anaconda Smelter site, including but not limited to those investigations and activities described in specific reservations set forth elsewhere in this Consent Order; investigations and activities related to oversight of this Consent Order; forward planning for development of RI/FS Work Plans and Scopes of Work; and removal actions. In addition, EPA and the State specifically reserve the right to conduct an RI/FS for any operable unit or combinations thereof for which an Operable Unit-Specific Work Plan has not been initially incorporated into this Consent Order by reference or by subsequent amendment to the Consent Order if EPA, after consultation with the State, determines prior to delivering a draft RI/FS work plan to the Respondent under subparagraph IX.A.3. that the RI/FS will not be done properly by the Respondent or that conduct of the RI/FS by the Respondent is not practicable or is otherwise not in the public interest. (This shall not be construed to imply that the Anaconda Smelter site will be converted by EPA from a Federal CERCLA enforcement lead to a State CERCLA enforcement lead site.) EPA will notify the

Respondent in writing of EPA's determination to conduct an RI/FS at an operable unit and describe the basis for that determination. Such an EPA determination shall be subject to the dispute resolution procedures of this Consent Order. EPA and the State further retain all rights against parties not privy to this Consent Order which may arise out of the facts on which this Consent Order is based. Notwithstanding compliance with the terms of this Order, the Respondent is not released from liability for any actions for which the Respondent is otherwise liable under law.

2. EPA reserves the right to take appropriate enforcement action, including the right to seek monetary penalties or injunctive relief for any willful violation, failure, or refusal to comply with this Order. In addition, if the Respondent fails to remedy noncompliance with this Consent Order in a timely manner, EPA, after consultation with the State, may, after notification to the Respondent, initiate Federally funded response actions and pursue cost recovery under section 107 of CERCLA, 42 U.S.C. § 9607, including actions for treble damages.

3. Nothing herein shall be construed to release the Respondent from any liability for failure of the Respondent to perform the RI/FS in accordance with the Work Plan(s) incorporated herein. The parties further expressly recognize that this Consent Order and the successful completion and approval of the RI/FS do not represent satisfaction, waiver,

release, or covenant not to sue, of any claim of the United States or the State of Montana against the Respondent relating to the Anaconda Smelter site (including claims to require the Respondent to undertake further response actions and claims to seek reimbursement of response costs pursuant to section 107 of CERCLA).

4. The Respondent agrees to undertake all actions required by the terms and conditions hereunder, and consents to and will not contest or legally challenge the issuance of this Consent Order, the authenticity and accuracy of any data generated by the Respondent to support this action as provided in paragraph IX.G., or any of the requirements of this Consent Order.

5. Except as provided in paragraph IX.M.6. below, Respondent does not admit to any of the factual or legal determinations made by EPA and the State in paragraphs VI, VII, and VIII of this Consent Order or in work plans incorporated herein, and neither this Consent Order nor any action taken pursuant to it shall constitute an admission of liability or responsibility by the Respondent with respect to the Anaconda Smelter site.

6. The Respondent consents to the jurisdiction of EPA and the State (EPA as a party to this Consent Order and the State under applicable Federal or State law) in any proceeding to enforce this Consent Order. In any such proceeding, the Respondent will not contest, for the purposes of establishing jurisdiction, any Findings of Fact deemed necessary by the Court

to establish jurisdiction to enforce this Consent Order. EPA shall have the right to enforce this Consent Order by any enforcement action taken pursuant to CERCLA and/or any available legal authority including the right to seek injunctive relief and/or monetary penalties for any violations of this Consent Order. The State may enforce this Consent Order pursuant to applicable Federal or State law. The State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under CERCLA in the United States District Court for the district in which the facility is located, as provided in subsection 121(e)(2) of CERCLA, 42 U.S.C. subsection 9621(e)(2).

7. The State reserves all of its rights to act under section 107 of CERCLA or pursuant to State law regarding the Anaconda Smelter site.

8. With the exception of claims for costs reimbursed by Respondent to the State of Montana, pursuant to paragraph IX.L. of this Consent Order, EPA and the Respondent agree that the State of Montana, by signing this Consent Order or by any act or failure to act in any way related to this Consent Order, including the negotiation, preparation, execution, implementation, or enforcement of this Consent Order or any of its terms and conditions, does not release and expressly reserves any and all common law and Federal and State statutory claims, including claims pursuant to CERCLA, 42 U.S.C. §§ 9601-9675, that have arisen or may arise against the Respondent, including any

and all claims pertaining to the Anaconda Smelter site, for any and all available legal and equitable relief.

N. Disclaimers

No party shall be liable for any injuries or damages to persons or property resulting from acts or omissions of another party or its employees, agents, or contractors in carrying out the activities pursuant to this Consent Order, nor shall any party be held as a party to any contract entered into by another party or its employees, agents, or contractors in carrying out activities pursuant to this Consent Order.

O. Indemnification of the United States and the State

The Respondent agrees to indemnify and save and hold harmless the United States and the State, their agencies, departments, and employees from any and all claims or causes of action arising from or on account of acts or omissions of the Respondent, its agents, or assigns, in carrying out the activities performed pursuant to this Consent Order. EPA and the State are not parties to any contract involving the Respondent at the sites.

P. Notice of Right to Claim Confidentiality of Business Information

The Respondent may, if it desires, assert a business confidentiality claim covering part or all of the information requested by this Consent Order in the manner described by 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to the Respondent.

Q. Compliance With Other Laws

All actions carried out by the Respondent pursuant to this Consent Order shall be done in compliance with all applicable Federal, State, and local laws and regulations. The Respondent shall be responsible for obtaining all Federal, State, or local permits which are necessary for the performance of any work hereunder.

R. Administrative Record

EPA shall prepare the administrative record supporting the RI/FS work required under this Consent Order and any subsequent remedial decisions, and the Respondent agrees to cooperate with EPA in the preparation of the administrative record. The administrative record shall include, but not be limited to, all documents and data submitted by the Respondent pursuant to this Consent Order and all correspondence between EPA and the Respondent relating to implementation of this Consent Order, including documents referenced in paragraph IX.J. The administrative record shall also include, but not be limited to, all correspondence between EPA and the State as provided under CERCLA, the NCP, and applicable EPA guidance. Notwithstanding the preceding sentence, EPA and the State reserve the right to protect from disclosure to the Respondent and the public any documents and communications protected from disclosure under applicable State and Federal law. A list of confidential documents included in the administrative record shall be maintained in the administrative record available to the public.

The Respondent shall submit to EPA copies of all supporting documentation (such as QA/QC and chain of custody records, as well as scientific treatises or references which are not easily available to the general public) with each draft and final deliverable document required under this Consent Order and Work Plans for inclusion in the administrative record as appropriate.

S. Community Relations and Public Comment

1. The Respondent shall cooperate with EPA and the State in providing RI/FS information to the public. Upon the reasonable request of EPA or the State, the Respondent shall participate in the preparation of all appropriate information disseminated to the public and in public meetings which may be held or sponsored by EPA or the State to explain activities at the Anaconda Smelter site or concerning the RI/FS process at the site.

2. Within ten (10) calendar days of the date of execution of this Consent Order by EPA, EPA shall announce the availability of this Consent Order to the public for review and comment. EPA shall accept comments from the public for twenty-one (21) calendar days after such announcement. At the end of the twenty-one (21) calendar day period, EPA, in consultation with the State, shall review all such comments and shall either:

a. determine that this Consent Order should be made effective in its present form, in which case the EPA Project Coordinator shall so notify the Respondent in writing; or

b. determine that modification of this Consent Order is necessary, in which case the EPA Project Coordinator, after consultation with the State, will inform the Respondent in writing as to the nature of all changes deemed necessary by EPA. If the Respondent agrees to the modifications, the Consent Order shall be so modified. In the event that the Respondent does not agree to modifications required by EPA as a result of public comment, this Consent Order shall be withdrawn by EPA. In such an event, EPA and the State reserve all rights to take such actions as they deem necessary including, but not limited to, EPA's and the State's right to conduct a complete RI/FS, or any portion thereof, and EPA's and the State's rights to seek reimbursement pursuant to section 107 of CERCLA, 42 U.S.C. § 9607, from the Respondent for the costs incurred.

T. Effective Date and Subsequent Modification

1. In the event that EPA, in consultation with the State, determines that this Consent Order should be made effective in its present form following public comment as set forth in paragraph IX.S. of this Consent Order (Community Relations and Public Comment), the effective date of this Consent Order shall be the date on which the Respondent receives written notice from EPA pursuant to paragraph IX.S. of this Consent Order that EPA

intends that this Consent Order be effective. In the event that this Consent Order is modified by agreement of EPA, after consultation with the State, and the Respondent, following Public Comment as set forth in paragraph IX.S. of this Consent Order, the effective date of such modified Consent Order shall be the date on which it is signed by EPA.

2. This Consent Order may be amended by mutual agreement of EPA, in consultation with the State, and the Respondent. Such amendments shall be in writing and shall be effective as of the date the amendment is signed by EPA.

U. Waiver of Section 122 Procedure

The Respondent hereby agrees that, for purposes of this Consent Order, use of those procedures set forth in section 122 of CERCLA, 42 U.S.C. § 9622, would not be practicable, in the public interest, expedite the completion of the RI/FS at the site, nor minimize litigation, and hereby waives use of those procedures as set forth in section 122 of CERCLA.

V. Termination and Satisfaction

Except for paragraphs VI.1., VI.2., VI.3., VI.5., VI.6., VII, IX.G., IX.K.6., IX.M.6., IX.M.8., IX.O., and IX.M.1, this Consent Order shall terminate when the Respondent certifies that all activities required under this Consent Order have been performed (the "Certification"), and EPA, in consultation with the State, has approved the Certification. EPA shall approve or disapprove the Certification within six (6) months of submittal of the Certification of the Respondent.

W. Authority of Signatories

The signatories of this Consent Order for EPA and the Respondent state that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to bind legally the party represented by him or her to the Consent Order.

IT IS SO AGREED:

September 15 1988
Date

President
ARCO Coal Company, a Division
of Atlantic Richfield Company

IT IS SO AGREED IN A CONSULTATIVE CAPACITY:

9/23/88
Date

Dr. John J. Dryman, Director
Montana State Department of
Health and Environmental
Sciences

IT IS SO ORDERED AND AGREED:

9/29/88
Date of Issuance

James J. Scherer
Regional Administrator
U.S. Environmental Protection
Agency
Region VIII

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

OCT -7 AM 11:01

FILED
EPA REGION VIII
REGIONAL CLERK

IN THE MATTER OF: ATLANTIC RICHFIELD COMPANY, a Delaware corporation. Respondent. PROCEEDING UNDER SECTIONS 104(b), 122(a), AND 122(d)(3) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, AS AMENDED, 42 U.S.C. SECTION 9601, et seq.	SEVENTH AMENDMENT TO ADMINISTRATIVE ORDER ON CONSENT Docket No. CERCLA VIII-88-16

AMENDMENT TO ADMINISTRATIVE ORDER ON CONSENT, DOCKET NO. CERCLA VIII-88-16 ADDING REQUIREMENT FOR CONDUCT OF REMEDIAL INVESTIGATION/FEASIBILITY STUDIES FOR REGIONAL WATER AND WASTE AND COMMUNITY SOILS OPERABLE UNITS

In consultation with the State of Montana (represented by the Montana Department of Health and Environmental Sciences (MDHES)), the United States Environmental Protection Agency (EPA) and the Atlantic Richfield Company (ARCO) hereby agree that the Anaconda Smelter Site Administrative Order on Consent, Docket No. CERCLA-VIII-88-16 ("Smelter Consent Order") shall be amended pursuant to Paragraphs IX.A.1. to .4 and IX.T.2., as follows:

I. Findings of Fact

EPA, in consultation with MDHES, has made the following findings of fact:

1. The findings of fact entered under the original Consent Order, Section VI., are incorporated by reference into this Consent Order Amendment.

II. Conclusions of Law

Based on the Findings of Fact, above, and based on the administrative record for the Smelter Site, EPA, in consultation with MDHES, has made the following conclusions of law:

1. The Conclusions of Law entered under the Consent Order, Section VII., are hereby incorporated by reference.

III. Determinations

Based on the Findings of Fact and the Conclusions of Law set forth above, and the entire administrative record, EPA, in consultation with MDHES, has determined the following:

1. The actions required by this Consent Order Amendment are necessary to protect the public health or welfare or the environment, are in the public interest, are not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan, and will expedite effective remedial action and minimize litigation.

2. The Respondent is qualified to perform the actions set forth in this Consent Order Amendment promptly and properly.

IV. Order

1. Anaconda Regional Water and Waste Operable Unit. The Respondent agrees and is ordered to perform a Remedial Investigation/Feasibility Study for the Anaconda Regional Water and Waste Operable Unit of the Anaconda Smelter Superfund Site, according to the Statement of Work, Remedial Investigation Outline, and Schedule, attached hereto, respectively, as Exhibits A, B, and C.

2. Community Soils Operable Unit. The Respondent agrees and is ordered to perform a Remedial Investigation/Feasibility Study for the Community Soils Operable Unit of the Anaconda Smelter Superfund Site, according to the Workplan attached hereto as Exhibit D.

3. Exhibits A, B, C, and D are hereby approved and incorporated under the Smelter Consent Order, Docket No. CERCLA VIII-88-16, as amended.

V. Modification/Effective Date

1. This Consent Order Amendment shall be effective as of the date of signature by EPA. This Consent Order Amendment is subject to modification as set forth in Section IX.T. to the same extent as the Consent Order.

VI. Signatories

1. Each signatory of this Consent Order Amendment states that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to bind legally the party represented by him or her to the Consent Order.

IT IS SO AGREED:

30 SEPT 94
Date

Michael O'Donnell, Manager
Rocky Mountain Environmental
Remediation, ARCO

IT IS SO AGREED IN A CONSULTATIVE CAPACITY:

9/30/94
DATE

Robert J. Robinson, Director
State of Montana
Department of Health and
Environmental Sciences

IT IS SO AGREED AND ORDERED:

9/30/94
DATE

Robert L. Duprey, Director
Hazardous Waste Management Division
U.S. Environmental Protection
Agency, Region VIII

EXHIBIT C

ANACONDA REGIONAL WATER & WASTE REMEDIAL
INVESTIGATION/FEASIBILITY STUDY SCHEDULE

Deliverable	Date
Draft SOW/RI Outline	Jan. 31, 1994
EPA Final Comments	March 15, 1994
AOC Signed by all Parties	Sept. 30, 1994
Preliminary Draft RI	Dec. 1, 1994
EPA Comments	Feb. 1, 1995
Final Draft RI	30 days after receiving baseline ecological risk assessment or comments on draft RI, whichever is later
EPA Approval of Final RI	60 days after receiving Final Draft RI
ARARs	
EPA Draft ARARs	Nov. 1, 1994
ARCO Submits Draft Clarification	Dec. 1, 1994 or 30 days after receiving draft ARARs, whichever is later
Final Clarification	Feb. 1, 1995 or 30 days from completion of draft clarification, whichever is later
EPA Draft Preliminary Screening Ecological Risk Assessment	August 1994
ARCO Comment on Draft ERA	Sept. 30, 1994
Ecological Risk Assessment	Nov. 14, 1994
Draft Technical Impracticability Analysis	30 days from approval of Final RI

EPA Comment on Draft TI Analysis (includes HQ review)	75 days from receipt of Draft TI Analysis
Final Draft TI Analysis	30 days from receipt of EPA comments
EPA Approval of TI Analysis	45 days from receipt of Final Draft TI
Draft FS	90 days from final approval of TI Analysis
EPA Comments	45 days from receipt of draft FS
Final FS	75 days from receipt of EPA comments on draft FS
EPA Approval Final FS	60 days from receipt of final FS
EPA Proposed Plan	60 days from approval of final FS
ARWW ROD	September 1996

C

Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
2012 WL 3871997
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal,
Fourth District, Division 2, California.

Mack P. WILLIS, Plaintiff and Appellant,
v.
City of RIALTO et al., Defendants and Respondents;
Ken Thompson, Inc. et al., Real Parties in Interest and Respondents.

E051792 | Filed September 7, 2012

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed. (Super.Ct.Nos. CIVSS708001 & CIVSS708002)

Attorneys and Law Firms

Gibson, Dunn & Crutcher, Jeffrey D. Dintzer and Matthew Wickersham; Hunsucker Goodstein & Nelson, Brian L. Zagon and Allison E. McAdam, for Plaintiff and Appellant Mack P. Willis.

Pillsbury Winthrop Shaw Pittman, Scott A. Sommer and Martin Sul; Paul Hastings LLP and Nicholas J. Begakis for Defendants and Respondents City of Rialto and Rialto City Council.

No appearance by real parties in interest and respondents.

Opinion

OPINION

HOLLENHORST, Acting P. J.

*1 Plaintiff Mack P. Willis appeals the judgment and order granting the demurrer to his petition for writ of mandate to compel the City of Rialto (City) to enforce its own environmental mitigation measure against Real Party in Interest Ken Thompson, Inc. (Thompson). Finding no errors, we affirm.[1]

I. PROCEDURAL BACKGROUND AND FACTS[2]

"From approximately 1957 through 1963, Goodrich [Corporation (Goodrich)] owned and operated a small research and development rocket production facility on a 160–acre parcel in the City. From 1968 through 1988, Pyrotronics Corporation, a fireworks manufacturer and distributor, operated on the same 160–acre parcel. In 1972, Pyrotronics constructed a 'fireworks residual pit' referred to as the 'McLaughlin Pit' for the purpose of disposing waste fireworks powder, pyrotechnic composition, defective and off-specification fireworks. After Pyrotronics left, Thompson sought to construct a concrete products manufacturing plant (the Project) in the same area. Pursuant to California Environmental Quality Act (CEQA) (Pub. Res.Code, §§ 21000 et seq.), on or about March 12, 1987, the City adopted a Mitigated Negative Declaration (MND) for the Project, which permitted Thompson to proceed with its proposed construction of a 15,000 square-foot precast concrete products manufacturing plant (and an equal-sized expansion in the future), as well as a 5,000 square-foot office building and associated facilities. The MND [contained Mitigation Measure No. 2, which] required Thompson to complete a satisfactory cleanup of the McLaughlin Pit and to certify the completion in a report to the City Engineer. The City approved the Project on June 4, 1987, and issued a CEQA Notice of Determination. The grading plan was approved and grading began on July 15, 1987. Thompson allegedly burned any remaining material and filled the McLaughlin Pit in December 1987.

"Ten years later, in 1997, perchlorate was reported in several municipal water supply wells in the Rialto/Colton area. The California Regional Water Quality Control Board, Santa Ana Region (the Water Board) acted as lead agency in investigating the contamination and designing and implementing a final remedy. The Water Board issued a number of cleanup and abatement orders. Adjudicatory administrative proceedings at the State Water Quality Control Board began February 2007. The City filed actions against Goodrich[, Pyro Spectaculars Inc. (Pyro)] [3] and other parties in federal court under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq. and state law." (*Goodrich, supra,* E045057.)

*2 Willis is a resident of Rialto and a former employee of Goodrich. Souza is also a resident of Rialto and the

president of Pyro. As noted above, Pyro is a codefendant with Goodrich in the City's actions in federal court. On October 31, 2007, Souza and Willis filed verified petitions for writ of mandate, which were later amended on October 26, 2009, seeking to compel the City to interpret and apply its 1987 Mitigation Measure No. 2 to require Thompson to clean up and remediate the perchlorate contamination relating to the McLaughlin Pit located within the 160–acre Goodrich Superfund Site.[4] Neither petition alleges any insufficiency in the posting or supplying of any requisite notices under CEQA and the Government Code to the public at all times during the CEQA approval process of the Mitigation Measure No. 2. The petitions note that the McLaughlin Pit was burned on December 4, 1987, by the pouring of four 55–gallon drums of diesel fuel in the pit, then placing a " 'very significant' amount of black powder" on top, followed by placing "six to eight pairs of magnesium flares" at various locations around the pit on top of the powder. "Photographs show a spectacular explosion and a large cloud of smoke after ignition." "The burn lasted for approximately eight hours, burning 'bright white' for about four hours.... There were several explosions during the burn." They further noted a substantial burn of "approximately 54,000 pounds (25 tons) of perchlorate-laden waste material ... on December 4, 1987."

In September 2009, the month prior to Willis and Souza filing their Second Amended Petitions, the United States Environmental Protection Agency (EPA) listed the Goodrich Superfund Site on the National Priorities List (NPL) as part of its ongoing removal and remedial actions for perchlorate contamination in the Rialto–Colton basin. The NPL guides the EPA "in determining which sites warrant further investigation," and allows the EPA "to assess the nature and extent of the human health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate." By listing the Goodrich Superfund Site, the EPA has identified the following as potentially responsible parties: Goodrich, Pyro, and Thompson.

On December 14, 2009, the City demurred to the petitions, to which Willis and Souza filed their oppositions.[5] On May 3, 2010, the trial court granted the City's demurrer as to both petitions without leave to amend on the grounds that the state law claims were preempted by CERCLA, and were barred by the statute of limitations. Subsequently, on June 30, 2010, the City's motion to dismiss the petitions was granted, and on September 7, 2010, notice of entry of judgment was served. Willis appeals.

II. STANDARD OF REVIEW

In evaluating an order sustaining a demurrer to a pleading, we give the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 564 [Fourth Dist., Div. Two].) We assume the truth of all material facts that have been properly pleaded, of material facts that may reasonably be inferred from those expressly pleaded, and of any material facts of which judicial notice has been requested and may be taken. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Mead v. Sanwa Bank of California, supra,* at p. 564.) We do not, however, assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869–870.)

"A complaint [or petition] is sufficient if it alleges facts which state a cause of action under any possible legal theory. [Citation.] However, because it is not a reviewing court's role to construct theories or arguments which would undermine the judgment [citation], we consider only those theories advanced in the appellant's briefs." (*Mead v. Sanwa Bank California, supra,* 61 Cal.App.4th at p. 564.)

Because the factual allegations are assumed to be true, the determination of whether the petition is sufficient—or in this case, whether the action is preempted pursuant to CERCLA and/or barred by the applicable statute of limitations—is purely an issue of law that we decide independently, without deferring to the trial court. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

III. STATUTE OF LIMITATIONS

*3 The trial court held that the four-year statute of limitations under Code of Civil Procedure section 343 had run on Petitioners' claims regarding a violation of Mitigation Measure No. 2,[6] which required Thompson to clean the McLaughlin Pit prior to beginning construction of the Project. According to the court, "once the grading, construction or installation occurred without the certification of a satisfactory completion of a cleanup

program to the City Engineer, the mitigation measure was violated.... [¶] It is the nature of the violation that determines whether it is a continuing violation or a one-time event that triggers a statute of limitations." Because the court held there was a one-time violation, not a continuing one, it ruled the petitions were time-barred.

A. Continuing Duty or One–Time Violation

On appeal, Willis challenges the trial court's ruling. He argues that the trial court "failed to recognize that under California law a continuing duty extends the statute of limitations.... The [trial court] also improperly applied the facts of this case, where the continuing duty is [the City's] ongoing failure to enforce Mitigation Measure No. 2, not the 'grading, construction and installation of equipment' which occurred. [Citation.]" According to Willis, "Mitigation Measure No. 2 was not put into place simply to mitigate the effects of grading or construction on the [Thompson] property. Its purpose was to mitigate against the possibility of harm from contamination caused by the McLaughlin Pit, and this purpose remains as relevant and necessary today." In support of his contention, Willis cites *Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601 (*Katzeff*).

In *Katzeff*, our colleagues in Division Four of the First District were called upon to "decide whether the California Department of Forestry and Fire Protection (CDF) properly granted an exemption allowing the harvesting of less than three acres of timber without environmental review, when one of the mitigation measures to two prior timber harvesting plans for the same property was that the trees in question remain in place to protect a neighboring property from excessive wind." (*Katzeff, supra,* 181 Cal.App.4th at p. 606.) According to the facts, Paul Katzeff owned property adjoining property owned by Ed Powers. In 1988, CDF approved a Timber Harvest Plan (THP) on Powers' land which included a mitigation condition requiring that " ' "no trees ... be removed from within 200 feet of [Katzeff's home] unless prior approval is obtained from [Katzeff]." ' " (*Ibid.*) Apparently, the removal of trees in a certain area would "allow wind to be funneled and accelerated, creating a threat of damage to Katzeff's property and home." (*Ibid.*) Ten years later, another THP was approved with the same wind buffer mitigation condition. (*Ibid.*) Under the Forest Practice Act of 1973 (Pub. Res.Code, § 4511 et seq.), THP's, including their mitigation conditions, are "effective for no more than three years unless extended pursuant to specified procedures. (*Katzeff, supra,* at p. 610.)

Powers sold the property to Greg Kuljian, who agreed to seek a "conversion exemption" to give Powers the right to log and sell the timber on the land. (*Katzeff, supra,* 181 Cal.App.4th at pp. 606–607.) In April 2008, CDF approved the conversion exemption. (*Id.* at p. 607.) Katzeff filed suit against CDF, Kuljian and Powers, alleging, among other things, CEQA violations. The trial court granted judgment on the pleadings in favor of defendants and Katzeff appealed. (*Katzeff, supra,* at p. 607.) The appellate court reversed. (*Id.* at p. 615.) On appeal, there were no issues regarding statutes of limitation, tolling, or alleged continuing duty. Instead, the issue was whether the CDF could approve the conversion exemption that would destroy a mitigation required under an expired THP without further environmental review. (*Id.* at p. 610.) Thus, the appellate court was called upon to address only the additional environmental review on the 2008 permit application, not the previous 1988 and 1998 ones. (*Id.* at pp. 610, 611, 614.) The court noted, "There may be good reasons for CDF to conclude that the wind buffer is no longer necessary.... [T]he passage of time may have eliminated the need for the mitigation...." (*Id.* at p. 614.)

*4 Because the *Katzeff* court opined that the mere passage of time "does not on its own render the mitigation inoperative," (*Katzeff, supra,* 181 Cal.App.4th at p. 614) Willis claims that "a mitigation measure, once adopted, cannot be deleted and is always subject to enforcement thereafter unless and until the agency has provide[d] a satisfactory reason to cancel it." We disagree. To begin with, such statement contradicts a prior statement from the First District: "In short, we find nothing in established law or in logic to support the conclusion that a mitigation measure, once adopted, never can be deleted." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359.) Rather, the continuing need of a mitigation measure must be evaluated on its own merits. (*Ibid.*)

Second, and more importantly, Willis misinterprets the language in *Katzeff*. The central issue in the case was not the violation of a mitigation measure, or the continuing duty to enforce a mitigation condition. Rather, the issue was the approval of the 2008 permit application (involving a pending harvest of timber that had not yet occurred) in the absence of an environmental review. If there had been such duty, the existence of the 1988 mitigation condition would have been continued and there would have been no need to impose a new one in 1998, or to consider the need for another in 2008. Thus, as the City aptly notes: "In this case, we are dealing solely with the now-expired 1987 Mitigation Measure No. 2, and there is no pending permit application whatsoever alleged in the Second Amended Petition[ ]s." (Boldface in original.)

Moreover, as the trial court observed, unlike the facts in this case, *Katzeff* did not involve the violation of a mitigation measure.

For the above reasons, we conclude that if there was no certification of a satisfactory completion of the cleanup program to the City Engineer as required by Mitigation Measure No. 2, this amounted to a one-time violation, not a continuing one. Accordingly, even if we apply the four-year statute of limitations under Code of Civil Procedure section 343, Willis's claims (filed in 2007) are time-barred.

B. Delayed Discovery

Notwithstanding the above, Willis argues that the statute of limitations was tolled because he was unable to discover the City's failure to enforce the mitigation measure until 2007. Regarding any possible delay in the accrual of the statute of limitations, the trial court found that Willis failed to "specifically plead the relevant facts to support [their delayed discovery] claim...." Willis challenges this finding, contending his claims against the City did not accrue until he gained actual notice of the violation. He argues that "no reasonable person could have been on notice of the basis for the claims alleged in the [p]etitions until early 2007, well within the four-year statutory period under Code of Civil Procedure Section 343."

According to the petitions, the relevant facts are: Thompson was required to clean up the McLaughlin Pit in 1987, prior to grading and constructing the Project. The requisite CEQA notices were posted and supplied to the public. Thompson's actions in December 1987 regarding cleaning up the McLaughlin Pit were visible to the public. Perchlorate in groundwater was not a concern until mid–1997, when (1) regulators devised a chemical method to detect concentrations below 400 ppb (parts per billion) in water, and (2) it was first detected in the Rialto/Colton Groundwater Basin. Even after detecting its presence, it took several years to determine that the McLaughlin Pit was a potential source. And finally, the City's file is void of any certifications, permits or approvals required by Mitigation Measure No. 2.[7]

*5 Based on these facts, specifically, the inability to detect perchlorate in groundwater and the absence of any certifications, permits or approvals required by Mitigation Measure No. 2, Willis argues he has "sufficiently alleged grounds for tolling of any statute of limitations."

In response, the City contends the "public notices and a publicly visible project, not to mention the visible burn of the pit on December 4, 1987, constitute constructive public knowledge," and the City's file was open to inspection at all times under the California Public Records Act, Government Code section 6253, subdivision (a). Thus, the City argues that "a diligent plaintiff should be able to discover, within the statutory period, whether a cause of action exits," quoting *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1197.

A plaintiff whose claims would be barred without the benefit of the discovery rule must specifically plead and prove facts to show (1) the time and manner of discovery, and (2) the inability to have made an earlier discovery despite reasonable diligence. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) "The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer. [Citations.]" (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160, superseded by statute on other grounds as stated in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637, fn. 8.) "The test for belated discovery is whether the plaintiff has information of circumstances ' " '... sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation.' [Citations.]...." ' " (*Bastian v. County of San Luis Obispo* (1988) 199 Cal.App.3d 520, 527.)

Regarding Willis's inability to detect the pollution in the groundwater, the City questions how Willis could have learned about the pollution as a result of the federal litigation but not any sooner. Willis alleges (1) he is a private citizen resident of the City, (2) he is not a party to the federal litigation, and (3) information of the City's failure to enforce Mitigation Measure No. 2 was only discovered through the federal litigation, which is not available to the public. Assuming discovery in the federal litigation was not open to the public, the City questions how Willis could have obtained discovery in an action to which he is not a party but was unable to access the City's own public records regarding Mitigation Measure No. 2 and Thompson's Project pursuant to the California Public Records Act. "The premise of the California Public Records Act (Gov.Code, § 6250 et seq ....) is that 'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.' ([Gov.Code,] § 6250.) To implement that right, the act declares that '[p]ublic records are open to inspection.' ([Gov.Code,] § 6253.)" (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1064.) Given the fact that such records were available by inspection or by request for public records, the City argues, "This discovery in federal court, 16 years after expiration of the

four-year statute of limitations ... in 1991, has no legal significance here." We agree.

*6 As the City notes, there are no allegations in Willis's petition that the files and records regarding Mitigation Measure No. 2 were not available to the public in 1987 and continuing throughout the progress of the Project. In his reply brief, Willis cites to his petition, which alleges that "Documents and testimony concerning the City's failure to enforce the mitigation measures were not produced by the City until April 2007, although they had been formerly requested from the City as far back as 2002, when the 160–acre site first became known to State regulators as a possible source of perchlorate contamination in the Rialto/Colton basin."[8] Other than these general assertions, Willis has failed to specifically plead facts to show his reasonable diligence and his inability to have discovered the City's acts earlier. (*McKelvey v. Boeing North American, Inc.*, *supra*, 74 Cal.App.4th at p. 160.) Who requested the documents? When was the first request made?

Notwithstanding the above, neither Willis's nor Souza's petition alleges that even if all the certifications, permits or approvals required by Mitigation Measure No. 2 had been completed, the City would have discovered the McLaughlin Pit was or would be a potential source of perchlorate contamination in the groundwater. Moreover, even if the City would have discovered that the McLaughlin Pit was a potential source of perchlorate contamination in groundwater, there is no allegation that the level of perchlorate contamination would have been considered a concern in 1987, given the fact that regulators did not devise a chemical method to detect concentrations below 400 ppb in water until mid–1997.

Based on the above, we agree with the trial court's conclusion that "the violation of the mitigation measure is the construction without certification of the cleanup, not the failure to cleanup itself." Construction of the Project resulted in Mitigation Measure No. 2. Again, there is no allegation that the mitigated negative declaration was not publicly available when it was adopted. While Willis claims "It is beyond reason and common sense to assume that an average person walking by the Site in 1987 would have been put on notice" that the City had enacted a mitigated negative declaration containing Mitigation Measure No. 2 which it did not enforce, we note that Willis is not an average person. According to his petition, he is a citizen, property owner, and taxpayer in the City, and is "within the class of persons beneficially interested in the City's faithful performance of its public duty to enforce Mitigation Measure No. 2 against [Thompson]." As such, Willis initiated this action despite the fact he was not a party to the federal litigation and thus would not have had access to the City's documents produced through discovery. Yet he was able to "discover [the City's] failure to comply with its duty to enforce Mitigation Measure No. 2." However, unlike the private federal litigation, construction of the Project is not something that could have been hidden from public view. As a citizen who was beneficially interested in the City's faithful performance of its public duty, a diligent petitioner should have been able to discover the City's failure to enforce Mitigation Measure No. 2 within the statutory period. (*Utility Cost Management v. Indian Wells Valley Water Dist.*, *supra*, 26 Cal.4th at p. 1197.) We therefore conclude the trial court correctly found that the statute of limitations had expired and that Willis was unable to allege a tolling.[9]

IV. ARE WILLIS'S CLAIMS PREEMPTED BY CERCLA?

*7 The trial court found that because Willis sought an order requiring the City to enforce Mitigation Measure No. 2 against Thompson, which required Thompson to properly clean up and close the McLaughlin Pit, his action directly impacted the cleanup of the McLaughlin Pit. As such, the trial court held that Willis's action was preempted by CERCLA.

On appeal, Willis challenges the trial court's finding that his claims are preempted by CERCLA, contending his action does not "seek to challenge or alter any cleanup being overseen by the EPA." He argues that his only cause of action is for a writ of mandamus under Civil Code section 1085, which "plainly is *not* a cause of action arising under CERCLA." (Underling in original.) On its face, an action that merely seeks to compel the City to enforce Mitigation Measure No. 2 does not appear to be preempted by CERCLA. However, a closer look reveals that Willis's action seeks to compel Thompson "to fulfill its obligation to properly cleanup and close the McLaughlin Pit and remediate the contamination caused by the McLaughlin Pit, obtain all required public agency approvals and permits associated with the cleanup and closure of the McLaughlin Pit, and provide a report to the Rialto City Engineer certifying completion of the cleanup of the McLaughlin Pit." As such, the action does challenge the CERCLA cleanup and thus it is preempted by CERCLA.

"CERCLA was enacted ' "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with

abandoned and inactive hazardous waste disposal sites." ' [Citation.] CERCLA is 'a comprehensive environmental statute principally designed to effectuate two goals: (1) the cleanup of toxic waste sites; and (2) the compensation of those who have attended to the remediation of environmental hazards.' [Citation.] The elements of a claim by a government agency to recover costs associated with a cleanup conducted under CERCLA are: (1) the site is a 'facility'; (2) a 'release' or 'threatened release' of a hazardous substance occurred; (3) the government agency incurred costs not inconsistent with the national contingency plan; and (4) the defendant is a responsible party. [Citations.]" (*Redevelopment Agency v. Salvation Army* (2002) 103 Cal.App.4th 755, 764–765.)

As of September 2009, the EPA assumed jurisdiction over the Goodrich Superfund Site (which includes the McLaughlin Pit) under CERCLA and included it on the NPR as part of its ongoing removal and remedial actions for perchlorate contamination in the Rialto–Colton Basin. Cleanup of this site is currently being litigated in the federal courts. The EPA has identified parties who may be responsible for cost of the cleanup and drafted a groundwater cleanup plan. The EPA has also initiated and completed the Remedial Investigation and Feasibility Study (RI/FS) Report. By virtue of Title 42 United States Code section 9613(b), federal courts have exclusive original jurisdiction over all controversies arising under CERCLA. Because the EPA has initiated a remediation action regarding the McLaughlin Pit, Willis's action is jurisdictionally barred. (42 U.S.C. § 9613(b) ["Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act ...."] and § 9613(h) ["No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under [section 9621 of this title] (relating to cleanup standards) to review any challenges to removal or remedial action selected under [section 9604 of this title]...."]; *Razore v. Tulalip Tribes of Washington* (9th Cir.1995) 66 F.3d 236, 239.)

*8 Although Willis maintains his petition "do[es] not seek to enforce CERCLA laws or to challenge any action taken pursuant to CERCLA," the prayer for relief suggests otherwise. "An action constitutes a challenge if it is related to the goals of the cleanup. [Citation.]" (*Razore v. Tulalip Tribes of Washington, supra,* 66 F.3d at p. 239.) Thus, Willis's claims are necessarily federal claims under Title 42 United States Code section 9613(b) if they constitute a challenge to CERCLA cleanup. (*Fort Ord Toxics Project, Inc. v. California E.P.A.* (9th Cir.1999) 189 F.3d 828, 832 (*Fort Ord*).) The Ninth Circuit found "actions to challenge CERCLA cleanups where the plaintiff seeks to dictate specific remedial actions, *see* [citation]; to postpone the cleanup, *see* [citation]; to impose additional reporting requirements on the cleanup, *see* [citation]; or to terminate the RI/FS and alter the method and order of cleanup, *see* [citation]." (*ARCO Envir. Remed. v. Dept. of Hlth and Envir.* (9th Cir.2000) 213 F.3d 1108, 1115 (*ARCO*).) An action may also be considered a challenge under Title 42 United States Code section 9613(h) when the relief sought would interfere with the cleanup plan. (*McClellan Ecological Seepage Situation v. Perry* (9th Cir.1995) 47 F.3d 325, 330 (*MESS*).)

In *MESS,* the complaint sought to "compel McClellan's [Air Force Base] compliance with [the Resource Conservation Recovery Act's] individual reporting and permitting requirements, in addition to the Interagency Agreement's comprehensive requirements." (*MESS, supra,* 47 F.3d at pp. 329–330, fn. omitted.) The Ninth Circuit observed that "the entire purpose of a permit requirement is to allow the regulating agency to impose requirements as a condition of the permit. The injection of new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup ... would clearly interfere with the cleanup." (*MESS, supra,* at p. 330.) We find the facts in *MESS* similar to the situation before this court. As in *MESS,* Willis seeks to compel the City's compliance with an expired 1987 mitigation measure which required Thompson to obtain certifications, permits or approvals prior to grading the Project. In order to obtain those certifications, permits or approval, Thompson must clean up the McLaughlin Pit; however, cleanup of the pit is already subject to the EPA's remediation action. Thus, Willis's action qualifies as a challenge to a CERCLA cleanup.

Likewise, we reject Willis's challenges to preemption on the grounds that (1) the language in Title 42 United States Code section 9613(h) expressly limits its application to federal courts, and (2) the federal district court recently stated that CERCLA does not preempt Willis's state law claims.[9] First, the language in the statute is clear and to the extent Willis's state law claims challenge a CERCLA cleanup, they are necessarily federal claims under Title 42 United States Code section 9613(b) regardless of the fact that they were brought in a state court action. (*ARCO, supra,* 213 F.3d at p. 1115; *Fort Ord, supra,* 189 F.3d at p. 832 ["Congress only removed *federal* court jurisdiction from 'challenges' to CERCLA cleanups because only federal courts shall have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place."].)

Second, we have denied Willis's request to take judicial notice of the June 14, 2011, order from the federal district court. Even if we were to consider the language in the order, the state law claims (state law Hazardous Substances Account Act, Porter–Cologne Act, negligence and nuisance claims) identified as not being preempted by CERCLA are not the same claims before this court.

*9 For the above reasons, we conclude that Willis's claims are preempted by CERCLA.

V. DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

We concur:

RICHLI, J.

MILLER, J.

Footnotes

1 Initially Paul Souza had joined in this appeal; however, prior to oral argument the parties stipulated to a dismissal of his appeal, which this court granted on June 6, 2012.

2 Because this case is related to a case that was previously before this court, namely, *Goodrich Corporation v. City of Rialto* (Nov. 23, 2009, E045057 [nonpub. opn.] modified 12/17/2009) (*Goodrich*), we take judicial notice of our prior opinion and modification and refer to them where relevant.

3 Pyrotronics and Pyro are distinct companies.

4 Although the petitions were filed separately, given the fact that they raised the same claims, the cases were consolidated.

5 The City also moved to strike the petitions; however, upon granting the demurrer, the court denied the motion to strike as moot.

6 "*Prior to any grading,* construction or installation of equipment on Parcel 11, the applicant *shall have completed* a satisfactory cleanup program of the fireworks residual pit on Parcel 11 and *shall* have certified the satisfactory completion of that program in a report to the City Engineer. As part of that cleanup program, the applicant shall obtain all necessary permits or approvals from local, state and/or federal agencies as required." (Italics added.)

7 To the extent Willis faults the trial court's factual findings as "directly refuted by the allegations in the [p]etitions, which must be treated as true for purposes of the [d]emurrers," we remind Willis that we assume the truth of all material facts that have been properly pleaded [and] of material facts that may reasonably be inferred from those expressly pleaded.... (*Crowley v. Katleman, supra,* 8 Cal.4th at p. 672; *Mead v. Sanwa Bank of California, supra,* 61 Cal.App.4th at p. 564.) We do not, however, assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri–City Hospital Dist., supra,* 2 Cal.4th at p. 967; *City of Morgan Hill v. Bay Area Air Quality Management Dist., supra,* 118 Cal.App.4th at pp. 869–870.)

8 Paragraph 26 in Souza's petition, which alleges, "the critical file that contained the 1987 [Mitigated Measure No. 2] was concealed by the City and only produced in April 2007, despite previous Public Records Act requests for these relevant files."

9 Because we affirm the trial court's finding that Willis's claims are barred by the four-year statute of limitations under Code of Civil Procedure section 343, we need not reach the City's alternate contention that such claims are barred by the 180–day statute of limitations under Public Resources Code section 21167, subdivision (a).

10 On August 23, 2011, Willis requested that this court take judicial notice of the "June 14, 2011 (In Chambers) Order Denying Defendants' Motion for Partial Summary Judgment, filed in the United States District Court, Central District of California, by the Honorable Philip S. Gutierrez, United States District Court Judge, in Case No. CV 09–1864(SSx)." The City opposed the request on the grounds that (1) the order was not before the trial court when it granted the City's demurrer and dismissed this action, (2) the order by itself is meaningless without the operative pleadings and motion papers, and (3) the state claims which the federal court stated were not preempted by CERCLA are not the same as Willis's claims. We agree with the City and deny Willis's request.

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742 A.2d 1095
Superior Court of Pennsylvania.

Robert C. O'NEAL, Jeff O'Neal, Scott R. O'Neal, James Hamacher, Mary Jean Hamacher, David B. Hamacher, John T. O'Donnell, Vivian J. O'Donnell, John T. O'Donnell, II, Drusanne O'Donnell, Katie O'Donnell, a Minor, by John T. and Drusanne O'Donnell, Her Parents and Guardians, Eileen S. Kroh, Dana J. Miller, Philip P. Riedel, Kerper W. Riedel, Theodore P. Riedel, Christina Riedel, William B. Whittock, Irene E. Whittock, and Susan Whittock, Appellants
v.
DEPARTMENT OF the ARMY OF the UNITED STATES of America and the United States of America, Appellee.
Redland Soccer Club, Inc., Bretni Brink, a Minor, by Tamara Brink, Ryan Brink, a Minor, by Tamara Brink, Joseph Brtalik, Carole G. Brtalik, Joseph J. Brtalik, Brian Brtalik, Wendy Brtalik, a Minor, by Joseph and Carole G. Brtalik, Theodore F. Burd, Diane M. Burd, Christopher T. Burd, a Minor, by Theodore F. and Diane M. Burd, Gregory C. Burd, a Minor, by Theodore F. and Diane M. Burd, Dewitt J. Cline, Jr., Jan M. Cline, Eric J. Cline, a Minor, by Dewitt J., Jr. and Jan M. Cline, Jeromy J. Cline, a Minor, by Dewitt J., Jr. and Jan M. Cline, Ronald W. Danner, Danielle M. Danner, a Minor, by Ronald W. Danner, Craig A. Danner, a Minor, by Ronald W. Danner, Theodore J. Elliott, Frances M. Elliott, Todd Elliott, a Minor, by Theodore F. and Frances M. Elliott, Tracey Elliott, a Minor, by Theodore J. and Frances M. Elliott, Steven W. Haas Irma L. Rodgers-Haas, Anthony M. Rodgers, a Minor, by Steven W. Haas and Irma L. Rodgers-Haas, Nicole C. Rodgers, a Minor, by Steven W. Haas and Irma L. Rodgers-Haas, Lawrence E. Hager, Ruth A. Hager, Samuel Hager, Benjamin Hager, a Minor, by Lawrence and Ruth Hager, Shawn Hager, a Minor, by Lawrence and Ruth Hager, Edward Hockenberry, Mary L. Hockenberry, Brett R. Hockenberry, a Minor, by Edward and Mary L. Hockenberry, Roger L. Hockenberry, Patricia D. Hockenberry, Keric L. Hockenberry, a Minor, by Roger L. and Patricia D. Hockenberry, Kodi B. Hockenberry, a Minor, by Roger L. and Patricia D. Hockenberry, Klint D. Hockenberry, a Minor, by Roger L. and Patricia D. Hockenberry, David G. Hooper, Priscilla G. Hooper, David G. Hooper, Ii, John H. Knaub, Deborah J. Knaub, Derek J. Knaub, a Minor, by John H. and Deborah J. Knaub, Sean M. Knaub, a Minor, by John H. and Deborah J. Knaub, Thomas R. Krause, Robert A. Krause, a Minor, by Thomas R. Krause, Richard H. Lebo, Donna Lebo, Trisha Lebo, a Minor, by Richard and Donna Lebo, Kristina Lebo, a Minor, by Richard and Donna Lebo, Ralph E. McCarty, Gale P. McCarty, Joshua H. McCarty, a Minor, by Ralph E. and Gale P. McCarty, Lucas P. McCarty, a Minor, by Ralph E. and Gale P. McCarty, James P. Meyers, Kim Meyers, Samantha Meyers, a Minor, by James and Kim Meyers, Brett Meyers, a Minor, by James and Kim Meyers, Thomas M. Morrow, Meredith S. Morrow, Gregory M. Morrow, a Minor, By Thomas M. and Meredith S. Morrow, Geoffrey T. Morrow, a Minor, by Thomas and Meredith S. Morrow, Jack E. Muth, Kathleen L. Muth, Robert C. Muth, a Minor, by Jack and Kathleen L. Muth, John A. Nace, Jr., Linda M. Nace, Michael Nace, a Minor, by John A. and Linda M. Nace, Robert Nace, a Minor, by John A. and Linda M. Nace, Kenneth E. Nace, Pamela R. Nace, Jeremy M. Nace, a Minor, by Kenneth E. and Pamela R. Nace, Kevin E. Nace, a Minor, by Kenneth E. and Pamela R. Nace, Melissa A. Nace, a Minor, by Kenneth E. and Pamela R. Nace, Dean G. Newhouse, Norma J. Newhouse, Martin Newhouse, Eric Newhouse, Benjamin Newhouse, a Minor, by Dean G. and Norma J. Newhouse, Peter P. O'Neill, Alice L. O'Neill, Peter O'Neill, Patrick O'Neill, Paul O'Neill, Patricia A. Palm, Dylan T. Buckwalter, a Minor, by Patricia A. Palm, Michelle A. Buckwalter, a Minor, by Patricia A. Palm, Robert J. Pontius, Cindy L. Pontius, Jay Pontius, a Minor, by Robert J. and Cindy L. Pontius, Debra S. Popp, Andrew J. Popp, a Minor by Debra S. Popp, Thomas M. Rados, a Minor, by Sonja Rados, William P. Rehm, Jr., Kimberly A. Rehm, David A. Rehm, a Minor, by William P., Jr. and Kimberly A. Rehm, Andar A. Rehm, a Minor, by William P. Jr., and Kimberly A. Rehm, Deon J. Rehm, a Minor, by William P., Jr. and Kimberly A. Rehm, Michelle D. Rehm, a Minor, by William P., Jr. and Kimberly A Rehm, Ken Ribble, Susan Ribble, Scott Ribble, a Minor, by Ken and Susan Ribble, Mark Ribble, a Minor, by Ken and Susan Ribble, Nevin C. Shenck, Jr., Lisa L. Shenck, Nathan S. Shenck, Aaron M. Shenck, a Minor, by Nevin C., Jr. and Lisa L. Shenck, Rebecca Shenck, a Minor, by Nevin C., Jr. and Lisa L. Shenck, Bradley Shirk, Richard V. Spong, Sr., Julia A. Spong, Richard V. Spong, Jr., Nathan M. Spong, Joelle L. Spong, Barry L. Stone, Matthew D. Stone, Corey J. Stroman, a Minor, by Lowell R. and Debra J. Stroman, Donna L. Szoszorek, Shannon M. Szoszorek, a Minor, By

Donna L. Szoszorek, Shayna M. Szoszorek, a Minor, by Donna L. Szoszorek, Eugene K. Torbek, Erik P. Torbek, a Minor, by Eugene K. Torbek, Donald Williamson, Elizabeth M. Williamson, Michael Williamson, a Minor, by Donald and Elizabeth Williamson, William B. Wirt, Pamela A. Wirt, Christine E. Wirt, Kevin M. Wirt, Timothy B. Wirt, a Minor, by William B. And Pamela A. Wirt, Bryan C. Wirt, a Minor, by William B. and Pamela A. Wirt, Burlin Covert, Joseph Dorwart, III, Patricia A. Dorwart, Joseph Dorwart, IV, a Minor, by Joseph Dorwart, III, and Patricia Dorwart, Alicia Dorwart, a Minor, by Joseph Dorwart, III, and Patricia Dorwart, Brent Dorwart, a Minor, by Joseph Dorwart, III, and Patricia Dorwart, Jack H. Hershberger, Jr., June Hershberger, Larry Smart, Carol Smart, Jeffrey Smart, a Minor, by Larry and Carol Smart, Crystal Smart, a Minor, by Larry and Carol Smart, Glenn Diller, Dale Kahler, Robert E. Kane, Terrence L. Kemberling, David A. Kupp, E. Robert McCollum, Herbert D. Myers, and Wilbur Yorty, Appellants,

v.

Department of the Army of the United States of America and the United States of America, Appellee.

Argued Sept. 28, 1999. | Filed Dec. 3, 1999.

Landowners and consumers of well water brought suit under the Hazardous Sites Cleanup Act (HSCA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against the United States, Department of the Army, and others, seeking medical monitoring to protect against disease that might occur as a result of using the well water, which was contaminated by the Army. After remand, 548 Pa. 178, 696 A.2d 137, the Court of Common Pleas, York County, Civil Division, Nos. 92-SU-05338-01, 92-SU-05339-01, Cassimatis, J., dismissed. Landowners and consumers appealed. The Superior Court, Nos. 295, 296 MDA 1999, Cavanaugh, J., held that: (1) CERCLA's incorporation of states' environmental laws as part of its enforcement responsibilities was not a waiver of sovereign immunity by the United States, and (2) a violation of equitable principles was not a sufficient basis to overturn decision that jurisdiction was lacking.

Affirmed.

[1] **United States**
⇐Necessity of Waiver or Consent

The United States enjoys sovereign immunity and may not be sued without its consent.

[2] **United States**
⇐Power to Waive Immunity or Consent to Suit
United States
⇐Construction of Waiver or Consent in General

As a corollary to its right of sovereign immunity, the United States may waive its privilege through the instrumentality of the United States Congress, and when waiver is granted, the statutory language is to be conservatively construed.

[3] **United States**
⇐Conditions and Restrictions

Waiver of sovereign immunity by the United States is not a matter of procedure, but of jurisdiction, whose limits are marked by the government's consent to be sued.

[4] **United States**
⇐Construction of Waiver or Consent in General

When a waiver of sovereign immunity by the United States is enacted, any limitation on the choice of forum for pursuit of the litigation must be strictly construed.

West Headnotes (8)

[5] **Courts**
Exclusive or Concurrent Jurisdiction
United States
Nature of Action in General

CERCLA's incorporation of states' environmental laws as part of its enforcement responsibilities was not a waiver of sovereign immunity by the United States with respect to claims arising under state environmental laws, and thus, state court did not have jurisdiction to hear landowners' claim for medical monitoring under Hazardous Sites Cleanup Act (HSCA), as a remedy for their use of well water contaminated by the United States Army. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 120(a)(4), as amended, 42 U.S.C.A. § 9620(a)(4); 35 P.S. § 6020.101 et seq.

[6] **Courts**
Exclusive or Concurrent Jurisdiction

The right of enforcement of the Hazardous Sites Cleanup Act's (HSCA) remedy of medical monitoring was a "controversy," under the CERCLA's provision for exclusive district court jurisdiction "over all controversies," and thus, state court lacked jurisdiction under CERCLA to hear landowners' claim for medical monitoring for their use of well water contaminated the United States Army. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(b), as amended, 42 U.S.C.A. § 9613(b); 35 P.S. § 6020.101 et seq.

[7] **United States**
Immunity from Suit in General

Defense of sovereign immunity may be raised at any time.

[8] **Appeal and Error**
Defects, Objections, and Amendments
Appeal and Error
Review of Specific Questions in General

Appellate review was limited to trial court's decision that it lacked jurisdiction under CERCLA to hear landowners' claim for medical monitoring, as remedy under Hazardous Sites Cleanup Act (HSCA) for landowners' use of well water contaminated the United States Army; absent support of any citation of authority, "equitable principles" could not be considered. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(b), as amended, 42 U.S.C.A. § 9613(b); 35 P.S. § 6020.101 et seq.

Attorneys and Law Firms

*1098 Angela L. Dumm, Harrisburg, for appellants.

Christina Humway, Washington, DC, pro hac, for appellee.

Before McEWEN, President Judge, and CAVANAUGH, and STEVENS, JJ.

Opinion

CAVANAUGH, J.:

¶ 1 This is a lawsuit by users of a tract of land and consumers of well water which was contaminated by the conduct of appellees Department of Army, et. al. The suit seeks medical monitoring in aid of protecting against disease or other physical disorder which might be suffered as a result of exposure to the contamination. The litigation has taken a tortuous path through our state and federal courts for almost a decade. The most recent appellate pronouncement was in the form of a decision by our Supreme Court.[1] Therein, the court remanded the matter to the trial court after deciding; A) that the plaintiffs had made out a *prima facie* case for special medical monitoring under the Pennsylvania Hazardous Sites Cleanup Act (H.S.C.A.), 35 P.S. § 6020.101 *et seq.*, sufficient to survive a motion for summary judgment; B)

the recovery of attorney fees is not prohibited under H.S.C.A. and is, therefore, permissible. Coincidentally, the court reserved for decision an issue of sovereign immunity "for the trial court's disposition of this case on remand."

¶ 2 On remand, the trial court denied defendants' motion for summary judgment, but on reconsideration, granted it in part and denied it in part. The defendants then moved for dismissal on the issue of lack of subject matter jurisdiction. The court granted this motion and dismissed. This order is the subject of the present appeal.

Discussion

¶ 3 We start with the proposition that appellants, having brought suit against government agencies (Department of Army, Department of Defense) for damages and injunctive relief, have brought an action against the United States. *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

[1] [2] [3] [4] ¶ 4 Given that the United States must be considered as the defendant in this action, we proceed to the principle that the United States enjoys sovereign immunity and may not be sued without its consent. *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *Kansas v. United States*, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510 (1907). As a corollary to its right of immunity, it *1099 follows that the sovereign may waive its privilege through the instrumentality of the United States Congress and when waiver is granted, the statutory language is to be conservatively construed. *U.S. v. Sherwood*, *supra*. "The matter is not one of procedure, but of jurisdiction whose limits are marked by the Government's consent to be sued." *Id.* at 591, 61 S.Ct. 767. More recently, the Supreme Court has instructed that courts must construe ambiguities in favor of immunity and that lack of clearly expressive waiver may not be interpreted as an intent to subject the Federal Government to damages. *Lane v. Pena*, 518 U.S. 187, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). When a waiver of immunity is enacted, any limitation on the choice of forum for pursuit of the litigation must be strictly construed. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939); *United States v. Sherwood*, *supra* ; *Mississippi v. Louisiana*, 506 U.S. 73, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992).

¶ 5 Presently, the waiver of governmental immunity for environmental contamination responsibility exists, if at all, under the terms of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (CERCLA). The CERCLA statute provides for limited jurisdiction in the federal district courts for all controversies arising under its aegis (with limited exceptions not here applicable):

42 U.S.C. § 9613

(b) Jurisdiction; venue

> Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter,[2] without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

¶ 6 Thus, we have a claim against the United States; pursuit of the claim is dependent on waiver of sovereign immunity; the waiver is provided in CERCLA; and CERCLA requires that the controversy be jurisdictionally limited to the federal court. Therefore, the trial court properly dismissed the suit.

APPELLANTS' CLAIMS

¶ 7 The present issue is complicated by the fact that appellants are presently pursuing relief by way of medical monitoring under provisions of state law. Indeed, our Supreme Court interpreted the H.S.C.A.[3] in a manner favorable to appellants' contentions before remanding the case to the York County Court for further proceedings. The Court's interpretation of the Pennsylvania law, H.S.C.A., was germane in two respects; 1) CERCLA incorporates state laws concerning removal and remediation in its scope of environmental standards for enforcement, 42 U.S.C. § 9620(a)(4), and; 2) as noted by our Supreme Court, "when a state Supreme Court has not spoken on an issue, the federal court must predict how the state court would resolve the issue." *Redland Soccer*, 696 A.2d at 143. Here, of course, the decision represents the actual view of our highest court.

[5] ¶ 8 Appellants argue that the provision of CERCLA, which incorporates states' environmental laws as part of its *1100 enforcement responsibilities, acts as a congressionally enacted waiver of immunity with respect to claims (such as this) arising under state environmental laws. Thus, it is argued, this is a consent to be sued in state court. It is further argued that the CERCLA federal district court exclusivity provision relates only to CERCLA claims under other CERCLA provisions-but not to claims founded on state law such as instantly. Appellants do not offer any authority for the proposition that the limit of jurisdiction set out in § 9613(b) applies only to CERCLA founded claims and that claims pursuant to state environmental laws may proceed in state court, but instead limits their argument to an attempt to attack the authority of two decisions which are argued by the appellees and employed by the trial court in support of their position. *Livingston Parish Police Jury v. Acadiana Shipyard*, 563 So.2d 394 (La.Ct.App.1990) cert. denied 567 So.2d 108 (La.1990) and *American Lifestyle Homes, Inc. v. United States*, 17 Cl.Ct. 711 (1989).

¶ 9 Despite appellants' reading of the case, we find that *Livingston Parish Police* clearly recognized and applied the doctrine of sovereign immunity to a state law rooted environmental substance case. It was found that federal sovereign immunity bars state court subject matter jurisdiction absent congressional authority. The court unequivocally concluded:

> Although CERCLA expressly states that the United States shall be subjected to liability under its provisions, 42 U.S.C. § 9620, again, with very limited exceptions not applicable in this case, Section 9613 of CERCLA vests exclusive jurisdiction over controversies arising under it in the federal district courts.

Id. at 400.

¶ 10 Similarly, in *American Lifestyle Homes*, the court stated:

> The United States has waived its immunity as to claims arising under CERCLA only to the extent that such actions are maintained in the district court. In pertinent part CERCLA provides, "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act...." 42 U.S.C. § 9613(b) (emphasis added). This jurisdictional limit must be strictly construed. Thus this court is prevented from asserting jurisdiction over matters arising under CERCLA which allows suit to be brought only in district court.

Id. at 715.

[6] ¶ 11 Appellants also argue that CERCLA is to be contrasted with federal court jurisdiction exclusivity under the Federal Tort Claims Act (F.T.C.A.), 28 U.S.C. § 2671 et seq. It is asserted that the F.T.C.A. demonstrates that when Congress intends to provide for federal court exclusivity even in cases based upon state law, Congress so states in clear and precise terms. (U.S. district court has "exclusive jurisdiction on claims.... In accordance with the law of a place where the act occurred.") Judicial Improvement Act, 28 U.S.C. § 1346(b).

¶ 12 The argument has no merit. The provision of CERCLA provides for exclusive U.S. District Court jurisdiction "over all controversies arising under this chapter." The right of enforcement of state law based on medical monitoring remedies is clearly a "controversy" within the broad terms of CERCLA jurisdiction. 42 U.S.C. § 9613(b).

¶ 13 Finally, appellants argue that the provision by which CERCLA subjected the United States to state law concerning removal and remedial action H.S.C.A. in itself confers jurisdiction in the state court. The provision pertinently states:

> 42 U.S.C. § 9620(a)(4) -
>
> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are subject of a deferral under subsection (h)(3)(c) when such facilities are not included on the National Priorities List.

*1101 ¶ 14 In view of the fact that CERCLA contains a separate comprehensive jurisdiction and venue provision, 42 U.S.C. § 9613(b), there is no reason to assume that Congress meant to confer jurisdiction over the present controversy to the state courts. We find nothing in § 9620(a)(4) which may reasonably be interpreted as either a waiver of immunity or a vestiture of jurisdiction in the state courts.

[7] [8] ¶ 15 Appellants' last and separate argument is offered without the support of any citation of authority. It is simply that the trial court's dismissal on the basis of lack of jurisdiction is improper because it violates equitable principles. It is true that appellants' Statement

of Facts contains a disturbing history of alarming land and water contamination over a significant land and water area and over a long period of years. It is also true that, upon affirmation of the instant trial court's dismissal, plaintiffs will have been rebuffed in both the state and federal forums, and their odyssey in the courts within this Commonwealth may be at an end. Moreover, the claim of immunity was, at least arguably, belated in its assertion. However, the trial court was faced with a fundamental question of law, its jurisdiction to hear the case and it decided that it was without jurisdiction. Our duty is limited to reviewing that decision. There is no other issue properly before us.[4]

¶ 16 In sum, we decide that the present claim against the United States must be pursued in strict accordance with the waiver of sovereign immunity; that waiver is found in CERCLA and CERCLA limits jurisdiction to the United States district courts. There is no other cognizable issue properly before us.

¶ 17 Order of dismissal affirmed.

Parallel Citations

1999 PA Super 298

Footnotes

1 *Redland Soccer v. Department of Army*, 548 Pa. 178, 696 A.2d 137 (1997). In this decision Madame Justice Newman included a detailed history of the litigation.

2 But see the language of CERCLA as contained in the Statutes at Large, 94 Stat. 2767, which refers to "... all controversies arising under this Act ...." This language is also employed at 42 U.S.C.S. § 9613(b). It appears that both the phrase "this chapter" and "this Act" refer to CERCLA.

3 35 P.S. § 6020.101 *et seq.*

4 As our Supreme Court noted in its consideration of this case, the defense of sovereign immunity may be raised at any time. Citing *Tulewicz v. SEPTA*, 529 Pa. 588, 606 A.2d 427 (1992).

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940 P.2d 1025
Colorado Court of Appeals,
Div. IV.

AZTEC MINERALS CORPORATION, Gray Eagle Mining Corporation and South Mountain Minerals Corporation, Plaintiffs-Appellants,
v.
Roy ROMER, Governor, State of Colorado; Patricia Nolan, Executive Director, Colorado Department of Public Health and Environment; James L. Lochhead, Executive Director, Colorado Department of Natural Resources, Defendants-Appellees.

No. 95CA1108. | Oct. 24, 1996. | Rehearing Denied Dec. 19, 1996. | Certiorari Denied July 28, 1997.

Property owners filed action against Governor, Executive Director of Colorado Department of Public Health and Environment (CDPHE), and Executive Director of Colorado Department of Natural Resources (DNR) seeking damages on basis of negligence, due process, and takings claims concerning regulation and remediation of mining site on property. The District Court, Rio Grande County, Robert W. Ogburn, J., dismissed with prejudice. Appeal was taken. The Court of Appeals, Erickson, J., sitting by assignment, held that: (1) negligence claim asserting CDPHE breached duty when it issued point source discharge permit to mining company without requiring property owners' signatures was precluded by Governmental Immunity Act (GIA); (2) actions of CDPHE and DNR in entering into response action agreements with Environmental Protection Agency (EPA) to abate nuisance by remedying environmental contamination at mining site and by providing technical and financial assistance to EPA did not rise to level of taking; and (3) EPA was necessary and indispensible party to takings and due process claims which essentially challenged reasonableness of EPA's response action and, thus, exclusive jurisdiction of federal courts for challenges to EPA removal actions prevented state trial court from involuntarily joining EPA and required dismissal of claims.

Judgment affirmed.

West Headnotes (11)

[1] **States**
Statutory provisions; waiver of immunity

Even if duty is imposed upon state pursuant to statute or common law, state is liable for breach of that duty only if first it is determined that sovereign immunity is waived for activity in question pursuant to Governmental Immunity Act (GIA). West's C.R.S.A. § 24-10-101 et seq.
1 Cases that cite this headnote

[2] **States**
Nature of Act or Claim

Claim asserting Colorado Department of Public Health and Environment (CDPHE) breached duty when it issued point source discharge permit to mining company without requiring property owners' signatures was precluded by Governmental Immunity Act (GIA), absent any express or implicit waiver of sovereign immunity under GIA for negligence in issuing point source discharge permits. West's C.R.S.A. § 24-10-106.

3 Cases that cite this headnote

[3] **Nuisance**
Nature and elements of private nuisance in general
Water Law
Pollution or deposits

Under state common law, landowners have duty to prevent activities and conditions on their land which create unreasonable risk of harm to others and cannot reasonably expect to put property to use that constitutes nuisance, even if that is only economically viable use for property, and thus have no right to pollute stream or use property in manner that could result in spread of radioactive contamination.

1 Cases that cite this headnote

[4] **Eminent Domain**
⇐What Constitutes a Taking; Police and Other Powers Distinguished

Government need not pay even for complete takeover or destruction of property if it is justified by owner's insistence on using property to injure other people or their property. West's C.R.S.A. Const. Art. 2, § 15.

[5] **Eminent Domain**
⇐Environmental Protection

Actions of Colorado Department of Public Health and Environment (CDPHE) and Colorado Department of Natural Resources (DNR) in entering into response action agreements with Environmental Protection Agency (EPA) to abate nuisance by remedying environmental contamination at former mining site and by providing technical and financial assistance to EPA did not rise to level of taking; property owners had no property right to permit continued degradation of environment surrounding site and thus creating hazard to public health. West's C.R.S.A. Const. Art. 2, § 15.

3 Cases that cite this headnote

[6] **Courts**
⇐Exclusive or Concurrent Jurisdiction

Property owners' allegations that state, by entering response action agreements and partially funding activities of Environmental Protection Agency (EPA) under those agreements, was responsible for EPA's actions was essentially challenge to EPA's response action under CERCLA for which jurisdiction rested solely in federal courts and did not implicate state's regulatory authority. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(b), 42 U.S.C.A. § 9613(b).

1 Cases that cite this headnote

[7] **Constitutional Law**
⇐Police power, relationship to due process
States
⇐Police power

When there is conflict between assertion that one is deprived of property without due process of law and reasonable exercise of police power, latter takes precedence and violation of due process cannot be asserted to stay legitimate exercise of police power. West's C.R.S.A. Const. Art. 2, § 25.

[8] **Parties**
⇐Bringing in New Parties

Rule of joinder of indispensible parties is mandatory and requires trial court, if feasible, to join persons falling within its provisions. Rules Civ.Proc., Rule 19(a).

[9] **Parties**
⇐Persons Who Must Join
Parties
⇐Persons Who Must Be Joined

Necessity of joinder must be determined on facts of each case, and whether person is indispensable party is mixed question of law and fact. Rules Civ.Proc., Rule 19.

3 Cases that cite this headnote

[10] **Appeal and Error**
⇐Allowance of remedy and matters of procedure in general

Trial court's decision on joinder of allegedly indispensible party will not be reversed absent abuse of discretion. Rules Civ.Proc., Rule 19.

1 Cases that cite this headnote

[11] **Eminent Domain**
Parties, process, and appearance
Environmental Law
Parties

Environmental Protection Agency (EPA) was necessary and indispensible party to property owners' takings and due process claims against state which essentially challenged reasonableness of EPA's response action under CERCLA concerning contamination at former mining site on property and, thus, exclusive jurisdiction of federal courts for challenges to EPA removal actions prevented state trial court from involuntarily joining EPA and required dismissal of claims. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(b), 42 U.S.C.A. § 9613(b); West's C.R.S.A. Const. Art. 2, §§ 15, 25.

2 Cases that cite this headnote

Attorneys and Law Firms

*1026 Gablehouse & Epel, P.C., Timothy R. Gablehouse, Debra L. Smith, Karina M. Thomas, Denver, for Plaintiffs-Appellants.

Gale A. Norton, Attorney General, Stephen K. ErkenBrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Gregg E. Kay, First Assistant Attorney General, Stephen M. Brown, Assistant Attorney General, Denver, for Defendants-Appellees.

Opinion
Opinion by Justice ERICKSON.*

Plaintiffs, Aztec Minerals Corporation, Gray Eagle Mining Corporation, and South Mountain Minerals Corporation, appeal from a judgment of the district court dismissing their complaint with prejudice. Defendants are the State of Colorado; Roy Romer, Governor; the Colorado Department of Public Health and Environment (CDPHE); Patricia Nolan, Executive Director; the Colorado Department of Natural Resources (DNR); and James L. Lochhead, Executive Director (collectively the State). We affirm.

I.

The Background and Operation of the Summitville Mine

Plaintiffs are the principal owners of the surface and mineral estates to property that *1027 encompassed what is commonly known as the Summitville Mine. The Summitville Mine is located in the Summitville Mining District (District) at the headwaters of the Rio Grande on the northeast flank of South Mountain within the San Juan Mountain Range. The mine site, which is heavily mineralized, covers approximately 1,400 acres ranging in altitude from 11,400 to 12,500 feet. It is located within two miles of the Continental Divide and is subject to severe weather, including heavy winter snows.

Gold was discovered in the District in 1870 and was initially mined using placer techniques. Underground gold mining commenced following lode discoveries in 1872. Significant lode and placer activity took place from 1875 to 1887. Mining activity subsequently declined with the depletion of high-grade ores. The District, however, experienced some periods of renewed activity in the decades preceding the development of the Summitville Mine.

In 1976, the General Assembly enacted the Colorado Mined Land Reclamation Act to provide a procedure for allowing the extraction of minerals and the reclamation of mine sites for a beneficial use, while protecting the environment. Section 34-32-101, et seq., C.R.S. (1995 Repl.Vol. 14). Reclamation standards established in the Act include prevention of acid mine drainage, maintenance of the hydrologic balance in the watershed, maintenance of water quality and quantity, soil stabilization on the mine site to prevent landslides or erosion, and, where practical, revegetation with self-sustaining plant species. Section 34-32-116(7), C.R.S. (1995 Repl.Vol. 14).

In 1984, plaintiffs leased the property on which the Summitville Mine is located to Galactic Resources, Inc., (GRI) and its subsidiary, Summitville Consolidated

Mining Company, Inc. (SCMCI). Shortly thereafter, SCMCI/GRI submitted an application to the Mined Land Reclamation Division (MLRD) (now known as the Division of Mines and Geology (DMG)), which was approved by the Colorado Mined Land Reclamation Board (MLRB) for a limited impact, open-pit, gold mining operation. The operation was designed to test the feasibility of extracting gold utilizing a cyanide heap leaching process. Plaintiffs were required to provide a performance bond to obtain approval of their application for a permit.

As the pilot project proceeded, SCMCI/GRI submitted an application in August 1984 for a large scale cyanide heap leaching operation at the Summitville site. The MLRB approved SCMCI's/GRI's application in October 1984 and construction of the mine, including the heap leach pad and liner, commenced in August 1985 and continued through the winter.

The heap leach pad liner was composed of an impermeable plastic membrane underlaid by a sand layer. The sand layer incorporated a leak detection system and was underlaid in part by a geotextile membrane which rested on top of a clay liner. A "french drain" system, consisting of crushed rock, collected groundwater that flowed under the liner. The purpose of the liner in addition to permitting the collection of the gold bearing cyanide solution for processing was to prevent the solution from entering into the surrounding environment.

Difficulties SCMCI/GRI encountered during the winter construction resulted in the liner being ripped and torn. While SCMCI/GRI made repairs to the liner prior to loading the heap leach pad with ore, leaks were detected between the upper and lower liners within a week after SCMCI/GRI began heap leaching operations in June 1986. Shortly thereafter, it was discovered that the lower liner was also leaking and that the cyanide solution was entering the french drain system.

As a result of the cyanide leaks, SCMCI/GRI proposed to the MLRB that it be allowed to pump water from the leak detection system and the french drain back onto the heap leach pad. This additional water, however, exacerbated a problem, which later became apparent, concerning the amount of water that could be contained by the heap leach pad without processing. The mine was originally conceived as a "zero discharge" facility.

Commencing in June 1987, the Summitville mine experienced a number of system failures *1028 which resulted in cyanide contaminated water being discharged into a nearby creek and into settling ponds on the site. To handle the increased volume of water in the heap leach pad, SCMCI/GRI entered into negotiations in 1988 with the Water Quality Control Division (WQCD) to obtain a point source discharge permit. A permit was subsequently approved by the WQCD in May 1989.

In 1989, SCMCI/GRI also obtained approval from the DMG and the MLRB to construct a process water treatment plant. The plant, however, could not sufficiently treat the water to the standards required by the WQCD.

SCMCI/GRI then sought and obtained permission from the MLRB to allow for land application of the water. The land application system called for SCMCI/GRI to spray contaminated liquid on surrounding lands where it would evaporate and percolate at a controlled rate into the ground. However, because of problems associated with this process, contaminated water flowed into the Wightman Fork and Cropsy Creek, tributaries of the Alamosa River.

In 1991, SCMCI/GRI, the MLRB, and the WQCD entered into a settlement agreement to address SCMCI/GRI's continuing problems at the site. The settlement agreement, which was amended in 1992, provided that SCMCI/GRI would submit a comprehensive plan to remedy its violations.

On December 4, 1992, approximately two weeks after SCMCI/GRI submitted its cleanup plan in which it estimated the cost of cleanup at $20 million, SCMCI/GRI declared bankruptcy and gave notice that it would no longer fund its operations at the site after December 15. Immediately thereafter, the Colorado Department of Health sought the assistance of the Environmental Protection Agency (EPA) to undertake an emergency response action at the site if one became necessary.

On December 15, 1992, the day SCMCI/GRI abandoned the site, the State obtained a temporary restraining order (TRO) against SCMCI/GRI to require continued operation of the water treatment facilities. Less than two weeks later, on December 28, the State obtained a preliminary injunction against SCMCI/GRI extending the TRO.

On December 16, 1992, the EPA entered the site pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), § 42 U.S.C. 9601, et seq., (1994), began operating the water treatment facilities, and sought to stabilize the site conditions. The State and the EPA subsequently entered into several response action contracts (Cropsy Phase I and Phase II agreements) to

remedy the environmental damage at the site. The agreements sought to eliminate the need for long-term treatment of hazardous substances releases from the Cropsy waste rock pile, reduce the subsurface infiltration of water through the mine pit, and improve the quality of the effluent from the Reynolds Adit. Pursuant to the agreements, the State agreed to fund a portion of the response costs using the financial warranties forfeited by SCMCI/GRI. As a result of problems associated with the Summitville site, the EPA, on May 31, 1994, listed Summitville on its National Priorities List, which catalogs the nation's most polluted sites.

II.

Plaintiffs' Complaint

In December 1994, plaintiffs brought this action against defendants seeking damages under four separate claims. Attached to and incorporated into the complaint were numerous exhibits pertaining to the site. Plaintiffs alleged that: (1) defendant CDPHE, acting through the WQCD, was negligent in failing to inform plaintiffs of the potential risks and liabilities associated with environmental contamination based upon SCMCI/GRI's activities at the Summitville Mine; (2) defendant DNR, acting through the MLRB and the MLRD/DMG, was negligent in failing adequately to regulate the mining operation, including evaluating and granting the mining permit; (3) all defendants, by assisting the EPA in moving the Cropsy waste rock pile and in plugging the historic tunnels and shafts at the Summitville site, trespassed on plaintiffs' property resulting in a taking of and damage to both the surface and mineral *1029 estates without just compensation in violation of Colo.Const. art. II, § 15; and (4) all defendants, by engaging in the action described in claim 3 above, have denied plaintiffs due process of law in violation of Colo.Const. art. II, § 25.

III.

Defendants' Motion to Dismiss

Defendants filed a motion to dismiss plaintiffs' complaint pursuant to C.R.C.P. 12(b)(1), (5), and (6). Attached to defendants' motion were several exhibits, including the findings and conclusions of law entered on the issuance of the TRO and the preliminary injunction.

Defendants asserted that plaintiffs' first and second claims for relief based on negligence were barred by the Colorado Governmental Immunity Act (GIA), § 24-10-101, et seq., C.R.S. (1988 Repl.Vol. 6A) because they were based in tort and because there was no express waiver of immunity in the GIA for such claims.

Defendants argued that plaintiffs' third claim for relief, asserting trespass and a taking, should be dismissed because: (1) a common law claim for trespass could not be joined with a claim for inverse condemnation; (2) a common law claim for trespass, because it lies in tort, is barred by the GIA; (3) a claim for inverse condemnation could not be maintained because none of the State agencies had the power of eminent domain; and (4) no trespass or violation of Colo.Const. art. II, § 15, had occurred because defendants were acting pursuant to their police powers to abate a public nuisance.

As to plaintiffs' fourth claim for relief, asserting a violation of due process, defendants asserted that it should be dismissed because, in the absence of a statute creating liability, Colo.Const. art. II, § 25 neither created a substantive right nor authorized a direct cause of action for damages.

Defendants later additionally asserted that the third and fourth claims should be dismissed for failure to join the EPA as an indispensable party.

IV.

Plaintiffs' Response to Defendants' Motion

In response to defendants' motion, plaintiffs answered that: (1) their negligence claims were not barred by the GIA because the State agencies specifically undertook and failed to carry out a duty they owed to plaintiffs; (2) the GIA does not apply to claims based on Colo.Const. art. II, §§ 15 and 25; (3) the State's actions went beyond its authority to abate a public nuisance subjecting it to liability under Colo.Const. art. II, §§ 15 and 25; and (4) the EPA was not an indispensable party to the litigation because plaintiffs were seeking damages only for the actions of the State agencies.

V.

The Trial Court's Ruling

The trial court held a hearing on defendants' motion at which the parties stipulated that an evidentiary hearing was not required. After hearing oral argument and considering the briefs and exhibits filed by the parties, the court subsequently entered a written order granting defendants' motion to dismiss, with prejudice.

Sovereign Immunity

The court ruled that plaintiffs' first two claims for relief, which the plaintiffs characterized as negligence claims, were torts. In addition, the court determined that plaintiffs' third claim for relief also sounded in tort and, like plaintiffs' negligence claims, was subject to the GIA. As to plaintiffs' fourth claim for relief, the court ruled that it was meritless because the due process provisions of the Colorado Constitution did not create substantive rights where none otherwise existed and that the GIA did not confer any substantive rights on plaintiffs.

The trial court found that none of the waiver exceptions in the GIA were applicable to any of plaintiffs' claims for relief. The court therefore concluded that it lacked subject matter jurisdiction under the GIA as to all four of plaintiffs' claims for relief.

In response to plaintiffs' argument that the GIA did not apply when the public entity *1030 undertakes a duty and breaches that duty, the court noted that § 24-10-106.5, C.R.S. (1988 Repl.Vol. 10A) provided that "a governmental entity will not be deemed to have assumed a duty by adopting a regulation or policy to protect the public's health or safety or by enforcing or failing to enforce such a policy or regulation." Relying on § 24-10-106.5, the court rejected plaintiffs' argument, based on *Leake v. Cain*, 720 P.2d 152 (Colo.1986), that defendants had assumed a duty towards them. It thus concluded that because plaintiffs' first three claims for relief were based on such a duty, those claims were barred by the GIA.

Trespass Claim

The trial court also concluded that even if plaintiffs' third claim for relief was not barred by the GIA, plaintiffs had failed to establish that DMG had trespassed on their property by exceeding its statutory authority in entering into the agreements with the EPA. The court also determined that DMG was acting within its statutory authority to reclaim the mine when it entered the property after SCMCI/GRI abandoned the site.

Takings Claim

The trial court concluded that defendants did not state a claim for relief under Colo.Const. art. II, § 15. The court ruled that plaintiffs failed to allege that the State had taken or damaged its property for a "public use" which it concluded was an essential element for such a claim. It also determined that because the State was acting pursuant to its police power to regulate private property for the benefit of the public pursuant to its statutory authority to abate a public nuisance, no claim under Colo.Const. art. II, § 15, could be asserted.

Due Process Claim

Relying on *Faber v. State*, 143 Colo. 240, 353 P.2d 609 (1960), the court found that plaintiffs' fourth claim for relief failed because, in the absence of a statutory right creating liability, Colo.Const. art. II, § 25 neither created a substantive right nor authorized a direct cause of action for damages.

EPA as an Indispensable Party

Alternatively, as to plaintiffs' third and fourth claims for relief, the trial court determined that, because these claims were based on the State's participation in the agreements with the EPA, the EPA was an indispensable party under C.R.C.P. 19. The court found that plaintiffs were attempting to challenge the actions EPA had undertaken pursuant to its authority under § 104 of CERCLA, 42 U.S.C. § 9604 (1994). The court also determined that without the EPA's presence in the suit, the EPA's interest in the site might be prejudiced and defendants might be subject to double, multiple, or inconsistent obligations. Because jurisdiction under CERCLA rested exclusively in the federal court, the court determined that the EPA could not be joined as a party and that plaintiffs' third and fourth claims must be dismissed.

VI. Issues On Appeal

Plaintiffs voluntarily dismissed their second claim for relief, negligence in regulating the mining operation. That claim is not before us on appeal. The remaining claims raise as issues for us to resolve: 1) whether a WQCD policy created a duty of care to which the GIA does not apply; 2) whether the actions of defendants constitute a taking for public or private use; 3) whether plaintiffs' due process rights have been violated; and 4) whether the EPA is an indispensable party.

VII.

Duty of Care

We first address plaintiffs' contention that the trial court erred in determining that the GIA barred their first claim for relief alleging negligence. In particular, plaintiffs assert that, pursuant to a WQCD policy providing that point source discharge permits should be jointly issued to the property owner and the operator of the mining site, the CDPHE owed a duty of care towards them. They argue CDPHE breached that duty when it issued the point source discharge permit to SCMCI/GRI without requiring their signatures and that their claim for that ***1031** breach is not subject to the GIA. We disagree.

The GIA bars actions against public entities for any injury that lies, or could lie, in tort with specific limited exceptions. *See* §§ 24-10-105, 24-10-106, C.R.S. (1988 Repl.Vol. 10A), and § 24-10-108, C.R.S. (1996 Cum.Supp.); *State Department of Highways v. Mountain States Telephone & Telegraph Co.*, 869 P.2d 1289 (Colo.1994).

In the declaration of policy, the GIA provides, in pertinent part, that:

> The general assembly also recognizes the desirability of including within one article all the circumstances under which the State, any of its political subdivisions, or the public employees of such public entities may be liable in actions which lie in tort or could lie in tort....

Section 24-10-102, C.R.S. (1988 Repl.Vol. 10A).

[1] This language and the other provisions of the GIA have been interpreted to manifest a clear and unequivocal intent by the General Assembly to confine the circumstances in which sovereign immunity may be waived to the exceptions specified therein. Thus, even if a duty is imposed upon the State pursuant to a statute or the common law, the State is liable for a breach of that duty "only if first it is determined that sovereign immunity is waived for the activity in question." *State Department of Highways v. Mountain States Telephone & Telegraph Co., supra,* 869 P.2d at 1292; *see also State v. Moldovan,* 842 P.2d 220 (Colo.1992). Accordingly, we reject plaintiffs' contrary argument, which is based on the erroneous conclusion that *Leake v. Cain, supra,* imposes a duty on the State and that the State may be liable for negligence, without regard to the GIA, by assuming a duty of care towards a third person. Moreover, *Leake v. Cain* has been superseded by § 24-10-106.5.

[2] None of the exceptions to immunity listed in the GIA either explicitly or implicitly waive sovereign immunity for the negligence of the CDPHE in issuing a point source discharge permit. *See* § 24-10-106, C.R.S. (1988 Repl.Vol. 10A).

Accordingly, the trial court did not err in determining that plaintiffs' first claim for relief was barred by the GIA.

VIII.

Takings

Plaintiffs contend that the trial court erred in determining that they failed in their third claim for relief to state a claim for relief under Colo.Const. art. II, § 15. We disagree.

Colo. Const. art. II, § 15 provides in pertinent part that:

> Private property shall not be taken or damaged, for public or private use, without just compensation....

A taking occurs when the public entity substantially deprives a property owner of the use and enjoyment of the property. *See City of Northglenn v. Grynberg,* 846 P.2d

175 (Colo.1993), *cert. denied,* 510 U.S. 815, 114 S.Ct. 63, 126 L.Ed.2d 33 (1993); *William E. Russell Coal Co. v. Board of County Commissioners,* 129 Colo. 330, 270 P.2d 772 (1954); *see also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). To recover in a damage case, the owner must show a unique or special injury which is different in kind from or not common to the general public. *City of Northglenn v. Grynberg, supra.*

The right to just compensation under the Colorado Constitution for the taking or damaging of property is not absolute. A governmental entity, pursuant to its police powers, "controls the use of property by the owner for the public good, authorizing its regulation and destruction without compensation...." *City & County of Denver v. Desert Truck Sales, Inc.,* 837 P.2d 759, 766-67 (Colo.1992), *quoting Lamm v. Volpe,* 449 F.2d 1202 (10th Cir.1971), *cert. denied,* 405 U.S. 1075, 92 S.Ct. 1495, 31 L.Ed.2d 809 (1972) (seizure of vehicle suspected to be stolen was a valid exercise of Denver's police powers).

[3] Under Colorado common law, landowners have a duty to prevent activities and conditions on their land which create an unreasonable risk of harm to others. A landowner *1032 cannot reasonably expect to put property to a use that constitutes a nuisance, even if that is the only economically viable use for the property. *See State v. The Mill,* 887 P.2d 993 (Colo.1994), *cert. denied,* 515 U.S. 1159, 115 S.Ct. 2612, 132 L.Ed.2d 855 (1995). More specifically, a landowner has no right to pollute a stream or use property in a manner that could result in the spread of radioactive contamination. *See State v. The Mill, supra; Slide Mines, Inc. v. Left Hand Ditch Co.,* 102 Colo. 69, 77 P.2d 125 (1938).

[4] Such uses were never part of the landowner's "bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332, 344 (1979). Thus, under such circumstances, a government need not pay even for complete takeover or destruction of property if it is justified by the owner's insistence on using the property to injure other people or their property. *See State v. The Mill, supra; Srb v. Board of County Commissioners,* 43 Colo.App. 14, 601 P.2d 1082 (1979) (failure to compensate owner for property destroyed does not violate just compensation clause of the Colorado Constitution when the property was taken under circumstances of imminent necessity).

[5] Under principles of Colorado nuisance law, plaintiffs had no property right in permitting the continued degradation of the environment at and surrounding the Summitville site and thus creating a hazard to public health. *See State v. The Mill, supra.* Plaintiffs did not dispute that significant environmental problems were present at the Summitville Mine. Based on plaintiffs' complaint, defendants' actions merely consisted of entering into the response action agreements with the EPA to remedy the environmental contamination at the Summitville site and providing technical and financial assistance to the EPA. These actions do not rise to the level of a taking.

While plaintiffs argue that the State went beyond its regulatory authority to abate any nuisance on the property, such an argument necessarily implicates the authority of the EPA to undertake the removal action.

Under CERCLA, the EPA has authority to bring a response action to abate a nuisance which constitutes an "imminent and substantial endangerment" to public health and the environment. *See* 42 U.S.C. § 9606 (1994). In light of the EPA's listing of the Summitville site on the National Priorities List, we find it implausible to conclude that the EPA did not have such authority here.

[6] In their complaint, plaintiffs alleged that the State, by entering the response action agreements and partially funding the EPA's activities under those agreements, was responsible for the EPA's actions. In essence, plaintiffs are challenging the EPA's response action under CERCLA for which jurisdiction rests solely in the federal courts. *See* 42 U.S.C. § 9613(b) (1994) (federal courts have exclusive jurisdiction over CERCLA claims). Accordingly, we conclude that plaintiffs' third claim for relief properly resides in the federal courts and does not implicate the State's regulatory authority.

Moreover, we cannot conceive of any set of facts in which the mere remediation of a contaminated site, even if it resulted in physical damage to the property, could result in a taking for public or private use. *See Lucas v. South Carolina Coastal Council, supra; City of Northglenn v. Grynberg, supra* (physical invasion of property did not constitute a taking when it did not result in a legal interference with the physical use, possession, enjoyment, or disposition of the property or translate into an exercise of dominion and control by a governmental entity); *see also United States v. Northeastern Pharmaceutical & Chemical Co.,* 810 F.2d 726 (8th Cir.1986), *cert denied,* 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *United States v. Conservation Chemical Co.,* 619 F.Supp. 162 (W.D.Mo.1985).

Therefore, we conclude that plaintiffs failed to state a claim that defendants' actions constituted a taking of their

property. Accordingly, the trial court properly dismissed plaintiffs' third claim for relief.

IX.

Due Process

Plaintiffs also contend that the trial court erred in determining that they failed to state *1033 a claim for relief under the due process clause of the Colorado Constitution. Again, we disagree.

Colo.Const. art. II, § 25, provides that:

> No person shall be deprived of life, liberty or property, without due process of law.

The supreme court has held that the right to the use and enjoyment of property is fully protected by the due process clause of the Colorado Constitution. *Western Income Properties, Inc. v. City & County of Denver,* 174 Colo. 533, 485 P.2d 120 (1971).

[7] When there is a conflict between an assertion that one is deprived of property without due process of law and a reasonable exercise of the police power, the latter takes precedence and a "violation of 'due process' cannot be asserted to stay the legitimate exercise of police power." *City & County of Denver v. Desert Truck Sales, Inc., supra,* 837 P.2d at 768.

Here, it is not disputed that defendants have substantial regulatory authority over the Summitville site. In its order, the trial court noted that, by statute, the State had authority to inspect the site, to reclaim the site, and to prevent the release of hazardous substances from the site after SCMCI/GRI had abandoned it. *See* §§ 34-32-117, 34-32-118, and 34-32-121, C.R.S. (1995 Repl.Vol. 14) (Colorado Mined Land Reclamation Act); §§ 25-8-306, 25-8-501, 25-8-605, 25-8-606, C.R.S. (1989 Repl.Vol. 11A) and § 25-8-607, C.R.S. (1996 Cum.Supp.) (Water Quality Control Act).

Plaintiffs' fourth claim for relief, like the third claim for relief, essentially challenges the EPA's response action under CERCLA. Again, because exclusive jurisdiction for such an action rests with the federal courts, *see* 42 U.S.C. § 9613(b), we conclude that any objections plaintiffs have with EPA's response action are properly heard by the federal courts. Furthermore, inasmuch as we conclude that defendants' actions did not result in a taking of plaintiffs' property, we also necessarily conclude that plaintiffs' due process claim based upon such a taking fails.

We therefore conclude, albeit for different reasons, that the trial court properly dismissed plaintiffs' fourth claim for relief.

X.

Indispensable Party

Finally, plaintiffs contend that the trial court erred in determining that the EPA was an indispensable party under C.R.C.P. 19 as to their third and fourth claims for relief. We disagree.

C.R.C.P. 19(a) provides in pertinent part:

> A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

[8] Joinder under C.R.C.P. 19(a) is mandatory and requires the trial court, if feasible, to join persons falling within its provisions. *Prutch Brothers Television & Music Systems, Inc. v. Crow Watson No. 8,* 732 P.2d 241 (Colo.App.1986). The prejudicial effect of non-joinder may be practical rather than legal in character-" '[J]oinder will be insisted upon if the action might detrimentally affect ... the absentee's ability to protect his property or to prosecute or defend any subsequent litigation in which he might become involved.' " *Potts v. Gordon,* 34 Colo.App.

128, 133, 525 P.2d 500, 503 (1974) (emphasis omitted).

Under C.R.C.P. 19(b), the trial court, in determining whether a person is an indispensable party, should consider: (1) the extent to which a judgment rendered in the person's absence might be prejudicial to him or her or those already parties; (2) the extent to which prejudice can be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or by other measures; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate ***1034** remedy if the action is dismissed for non-joinder.

[9] The necessity of joinder must be determined on the facts of each case, *Civil Service Commission v. District Court,* 185 Colo. 179, 522 P.2d 1231 (1974), and whether a person is an indispensable party is a mixed question of law and fact. *Sharp Bros. Contracting Co. v. Westvaco Corp.*, 878 P.2d 38 (Colo.App.1994).

[10] A trial court's decision under C.R.C.P. 19 will not be reversed absent an abuse of discretion. *Lyon v. Amoco Production Co.*, 923 P.2d 350 (Colo.App.1996).

[11] In light of our determination that plaintiffs' third and fourth claims for relief essentially challenge the reasonableness of the EPA's removal action, we conclude that the trial court properly ruled that the EPA was both a necessary and an indispensable party under C.R.C.P. 19. In addition, insofar as exclusive jurisdiction for a challenge to an EPA removal action resides in the federal courts, *see* 42 U.S.C. § 9613(b), EPA could not be involuntarily joined in this action, and we conclude that the trial court did not err in dismissing these claims for relief. Given the nature of plaintiffs' claims, we are unable to perceive how a judgment against the State or the State agencies would not implicate the removal action by the EPA or result in inconsistent obligations for the State.

Plaintiffs argue that dismissal of these claims will leave them without an adequate remedy because, even though they have filed an action in federal court, they are precluded by the Eleventh Amendment from joining the State or its agencies in the federal court action. While this may be true, *see Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (8th Cir.1995), we nevertheless conclude that it is not dispositive. Since the crux of plaintiffs' third and fourth claims for relief is the nature and scope of the EPA's response action, plaintiffs do have a "remedy" in that they may challenge that action in their federal lawsuit.

We therefore conclude that the trial court did not err in concluding that the EPA was both a necessary and an indispensable party as to plaintiffs' third and fourth claims for relief and in dismissing these claims.

The judgment is affirmed.

BRIGGS and TAUBMAN, JJ., concur.

Footnotes

* Sitting by assignment of the Chief Justice under provisions of the Colo.Const., art. VI, Sec. 5(3), and 24-51-1105, C.R.S. (1996 Cum.Supp.).

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